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# CONTENTS.

## VOL. I.

- 1. Principles of Mahomedan Law.
- 2. Indian Majority Act (IX. of 1875).
- 3. Transfer of Property Act (IV. of 1882).
- 4. Indian Registration Act (XVI. of 1908).
- 5. Indian Succession Act (X. of 1865).
- 6. Probate and Administration Act (V. of 1881).
- 7. Hindu Wills Act (XXI, of 1870).
- 8. Indian Contract Act (IX. of 1872).

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# A SUMMARY

OF

# THE MAHOMEDAN LAW

FOR THE USE OF STUDENTS.

BY

A. C. MITTRA, B.A., B.L.

## Calcutta:

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A. C. MITTRA AND N. D. BASU,
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## PREFACE.

In the following pages, an attempt has been made to collect the most important principles of the Mahomedan Law from the writings of eminent jurists. Of the works consulted by me in preparing this sketch, the Hedaya translated by Hamilton, Futwa Alamgiri as expounded in Baillie's Digest, 2 volumes, and The Tagore Law Lectures on the Mahomedan Law of both Schools by Babu Shyama Charan Sarkar, may be mentioned. This sketch is, however, not a complete one, and was never intended to be such. Its main object has been to bring before the student so much of the elementary principles of this branch of Law, and upon such of the topics, as would be likely to help him to answer an ordinary examination paper, and to give him an introduction to a study of the higher works.

CALCUTTA:

Dated 20th August 1901. A. C. MITIRA, B.A., B.L.

#### CONTENTS

			PAGE.
Preliminary	***	-	7
Minority and Gu	ardianship		8
Marriage	·•••		10
Dower			18
Fosterage	••	•••	23
Divorce			24
Iddat			30
Parentage			
Maintenance			
Pre-emption			
Gift			
Wills 🚜			4
Wukf			40
Inheritance			2 (C) 1

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## A SUMMARY

OF

# THE MAHOMEDAN LAW.

## PRELIMINARY.

- 1. Sources of the Mahomedan Law.—The primary source of the Mahomedan Law is the Kuran, which was revealed to Muhammad, the founder of the Mahomedan Faith.
- 2. The Kuran, though the primary source was not sufficient to meet all cases, and the extension of social relations necessitated the extension of the law as originally enunciated in the Kuran. This extension has been principally done by the Sunnat and the Hadis, the Ijmaa and the Kiyas. These are supposed as supplementary to the provisions of the Kuran, and are revered as being of equal authority.
- 3. The Sunnat and the Hadis are the traditions of the Prophet's doings and sayings. They were at first borne into memory, and were ultimately put down into writing.
- 4. The Ijmaa are the decisions of the Prophet's companions and their disciples.
- 5. The Kiyas were the analogical deductions drawn from the above sources, when they were insufficient to cover any new case.
- 6. Different sects.—There are numerous sects among the Mahomedans. But, in India, two principal sects are found to exist. These are, the Sunnis, and the Sheas. The Sunnis of India are the followers of Abu Hanija, and are, therefore, called the Sunnis of the Hanifite school. They form the

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orthodox creed. The Sheas are the followers of Ally. Their number in India is very few.

7. Abu Hanifa, and his two disciples, Abu Yusuf and Muhammad, are the expounders of the Sunni law.

### Minority and Guardianship.

- 8. According to the Mahomedan Law, a boy, or a girl, attains majority on the expiration of his or her *fifteenth* year, unless symptoms of puberty appear at an earlier age. But the law presumes that in a boy such symptoms of puberty cannot appear before his twelfth year, nor in a girl before her ninth year.
- 8. Minors are divided into mere infants, and such as have nearly attained puberty. Persons having the custody of infants, are distinguished from those who are their legal guardians. The custody of infants is called hizanat.
- 10. Hizanat means the custody of infants. The mother is the proper person entitled to the custody of her infant child, during the subsistence of the marriage and after her separation from her husband, unless she be an apostate, or wicked or unworthy to be trusted. Failing the mother, the custody, of the infant devolves upon the following persons in succession: the mother's mother, how high soever; the father's mother, how high soever; the full sister; the half sister by the mother; full sister's daughter; half sister's daughter; maternal aunts; paternal aunts; the maternal relations being preferred to those of the father's side. The rights of all women to the custody of an infant are made void by their marriage with strangers. But if they are married to relations of the infant, within the prohibited degrees, the right is not cancelled. Thus, when the infant's mother is married to its paternal uncle, the mother's right to the child's custody is not invalidated by such marriage. When a female's right to the custody of an infant, drops by her marrying a stranger, it revives upon the marriage being dissolved; and after the completion of her iddat, if she has been revocably divorced.

- 11. When there is no female relation of the infant to take charge of it, the custody devolves upon the agnates. First in order is the father of the infant; then the paternal grandfather, how high soever; then the full brother; then the half brother by the same father; then the full brother's son; then the half brother's son; then paternal uncle; then the paternal uncle's son. No male can be entrusted with the custody of a female child who is not within the prohibited degrees of relationship to her. Thus, a paternal uncle's son cannot have the custody of a girl. The male relative's custody over a girl is cancelled by his profligacy.
- 12. A female's custody of a boy terminates when he is seven years old. A female's custody of a girl continues till she attains puberty.
- 13. When a male relative has the custody of a boy, such custody terminates when the boy attains his puberty. The male relatives have no right to restrain a female who has been enjoyed, and who is able to take care of herself; or to retain ah adult virgin if she is advanced in years and has ripe discretion.
- 14. The proper place for the hizanat is where the husband and wife are residing, while the marriage subsists. After dissolution of the marriage, and the completion of the wife's iddat, the child is to live with the mother. But she cannot remove it to any place where the father cannot easily go and see it.
- 15. When a child becomes independent of a woman's care after the expiration of the period mentioned above, the guardianship devolves upon the child's agnates (males related through males, that is, without the intervention of any female.)
- 16. Guardians are of three kinds: (1) Natural; (2) Testamentary; and, (3) appointed by the Judge. The natural guardians are, the father, his executor, then the father's father and his executor, and then the executors of such executors. These are all near guardians. The distant paternal kindred are the remote natural guardians, but they have no control over the

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minor's property. Like them, the mother has not any control over the minor's property. The remote paternal kinsmen and the mother can exercise their guardianship for the purposes of the minor's education and marriage, but they have no authority when there is a guardian of the near natural group. Maternal relations are the lowest species of guardians, and they succeed in default of the paternal kinsmen and the mother.

#### Marriage.

- 17. (1) Marriage is merely a civil contract, with certain distinctions. Thus, it does not confer any rights on either party over the property of the other. The legal capacity of the wife is not sunk in that of the husband; she retains the power of disposing of her own property, of herself entering into contracts, and of suing and being sued, without the consent of the husband. She is not under the legal guardianship of the husband. On the other hand, the husband is not liable for her debts, though he is bound to maintain her.
- (2) It is unlawful for a man to have intercourse with a woman who is not his wife. Such intercourse is called Zina. The child born of such connection is illegitimate, and is called the child of Zina or fornication.
- 18. The object of the marriage contract is the right of enjoyment, procreation of children, and the solace of life as one of its necessities.
- 19. The pillars of marriage are declaration and acceptance. When these are absent no marriage is constituted.
- 20. The essential conditions requisite for the validity of marriage are—
- (1) The contracting parties must have understanding, puberty and freedom. An insane person, a minor without understanding, and a slave are not competent to contract a marriage. A minor, who has become discreet, is competent to marry, provided his guardian gives his consent.

- hearing of each other, and their import understood by the parties. When marriage is contracted through an agent, the hearing of the agent is in law the hearing of the principal.
- must be free, sane and adult, and must profess the Mussulman faith. There must be more than one witness, and one of the witnesses must be a male. If there are females as witnesses, there must be at least two of them together with a male witness. Thus, it would not be valid if there be one male and one female witness. There must be at least two male witnesses, or one male and two females.
- (4) The witnesses should hear the words of both the contracting parties, at the same time and place, and should understand what is said by them. It is also necessary that the witnesses should know the woman to be married. But it is not necessary that they should see her.
- (5) The declaration and acceptance must be expressed in the same meeting. When a proposal of marriage is made by means of a message or a letter, the acceptance must be declared in the presence of two witnesses who have heard the messenger or the reading of the letter.
  - (6) The acceptance must not vary from the declaration.
- (7) The woman shall be a fitting subject: she must be either a Mussulman, or of a religion professing one God; she must not be a prohibited relation.
- (8) The husband and wife shall both be known to each other.
- (9) The woman, if adult, must give her consent to the marriage by express words.
- 21. Legal Effects of Marriage.—It legalizes the mutual enjoyment of the parties. It subjects the wife to the husband's restraint. It imposes on the husband the obligation of dower, and of maintenance. It establishes the prohibitions of affinity on both sides. It confers on both sides the rights of mutual inheritance. It obliges the husband to be just between his wives, and to have regard to their respective rights.

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- 22. The words used in a contract for marriage are of two kinds: Surree, or plain, and kinayat, or ambiguous. The plain words are nikah and tazwiz. The ambiguous words are hiba or gift; tamlik, or transfer; sadkat, or alms, and the like. But marriage is not contracted by words importing hiring, or binding, or permitting, or, enjoying.
- 23. There is no valid contract if a marriage is referred to a future time, as if a man says, "I have married thee to my daughter to-morrow," nor if the marriage is suspended on a condition, as if a girl says, "I have married thee for so much, if my father permit."
- 24. Usufructuary and temporary marriages are not lawful in the sunni school. If a man takes a woman for enjoyment, saying, "I take thee for enjoyment for so many days, or for so much," such marriage is void.
- 25. When an illegal condition is attached to a marriage contract, the contract is valid, and the condition becomes inoperative.
- 26. Prohibited women—Consanguinity, affinity, and fosterage constitute the principal grounds of prohibition in Marriage.
- 27. First: Such as are prohibited by reason of consanguinity.... These are mothers, daughters, paternal and maternal aunts, brother's daughters, and sister's daughters. The word "mothers" includes a man's own mother and his grandmothers, whether paternal or maternal, and how high soever. "Daughters" include a man's own begotten daughters, his son's daughters, and his daughter's daughters, how low soever. "Sisters" are either his sisters of the whole blood, or his half sisters, whether by the father's or the mother's side. "Brother's daughters" and " sister's daughters" include any female descendant of a brother or sister. The "paternal aunts" are the full and half sisters of the father, and include the paternal aunis of the father and of the grand-fathers, the paternal aunts of the mother and of the grand-mothers. The "maternal aunts" are the mother's full and half sisters, and include the maternal aunts of fathers and mothers.

28. Secondly: Those prohibited by reason of affinity. These are—(1) the mothers of wives and their (the wives') paternal and maternal grandmothers: (2) the wife's daughters or the daughters of her children, provided consummation took place with such wife. Thus, if a man marries a woman who has a daughter or a son's daughter by a previous marriage, then the man cannot lawfully marry such daughter or son's daughter of his wife, if he has already consummated with the wife; if he has not consummated, then he can marry, but in that case the unconsummated wife becomes prohibited to him: (3) the wife of a son, or of a son's son, or of a daughter's son, how low soever, whether the son or son's son or daughter's son has consummated with her or not: and (4) the wives of fathers and of paternal and maternal grandfathers, how high soever. Prohibition by reason of affinity is established by sexual intercourse, whether lawful or illicit. Thus, when a man commits fornication with a woman, her mother and her daughters are prohibited to him, and the woman herself is prohibited to the man's father, or grandfather, his son, or his son's son. Even touching a woman with desire or kissing her, would establish prohibition by reason of affinity. Thus, a man cannot marry a woman whose daughter he has kissed with desire.

29. Thirdly: Relations who are prohibited by reasons of consanguinity and affinity, are also prohibited by reason of fosterage. Thus, a man's mother is prohibited to him by reason of consanguinity, therefore, his foster-mother is also prohibited to him. Foster-sisters are prohibited in the same manner as a man's own sisters are. Foster-son's wife is prohibited as much as a son's wife.

30. The relations by consanguinity, affinity, and fosterage, are perpetually forbidden to a man in marriage. There are other grounds of prohibition, and these are temporary;

women as his wives. Thus, a man to join more than four women as his wives. Thus, a man who has four wives living, can not marry a fifth in their lifetime; but, if one of the four dies, then he can lawfully marry abother, for the law is that a free man cannot have more than four wives at the same time.

(2) It is not lawful to join together any two women who, भारतीः if we suppose either of them to be a male, could not lawfully intermarry by reason of consanguinity or fosterage. Thus, it is not lawful to cohabit with two sisters, whether they be sisters by consanguinity or by fosterage. It is not lawful to join a woman with her paternal or maternal aunt, or with her समास daughter by another husband. If a man marries two sisters by one contract, he must be separated from both. If he marries them in succession, the first is a valid marriage, and the second is invalid, and he must divorce the second wife. Again, if a man marries more than four women by one contract, the marriage of all is invalid, and he must be separated from them all. But if he marries them by separate contracts, the marriage of the first four is valid, and that of the fifth is invalid. Again, it is not lawful to marry the sister of his divorced wife, so long

as the latter is in her iddat.

(3) A man may not lawfully marry the wife of another, nor the divorced wife nor the widow of another so long as she is in her *iddat*, nor a woman who has been pregnant by another husband from whom she has been separated by his death or divorce, before delivery takes place. But it is lawful for a man to marry a woman with whom he has had illicit intercourse, and who is thus pregnant.

(4) It is not lawful for a Mussulman to marry an infidel (whether an idolatress, or a worshipper of fire, or the sun or the stars). But a Mussulman may lawfully marry a kitabiah or a woman helieving in a revealed religion, such as a Christian or a lew.

(5) It is not lawful for a man to re-marry a free woman who was his wife, and whom he has given three divorces. But if the divorced wife gets married to another husband who consummates with her, and is then separated from him either by death or divorce, then she can be lawfully wedded by her former husband.

81. Guardianship in marriage belongs in the first instance to the agnates, in the same order as in inheritance.

- 32. The nearest guardian to a woman in reference to marriage is her son; then her son's son how low soever; next her father; then the father's father, how high soever. Next comes the full brother; then the half brother by the father's side; then the full brother's son, then the half brother's son. how low soever: then the full uncle; then the half uncle by the father's side; (that is, the father's half brother by his father's side); then the full uncle's son; then the half uncle's son; then the higher uncles (such as the father's full uncle and half uncle) and their sons in the same order, Failing these agnates, the guardianship devolves upon the mother; then upon the daughter; then the son's daughter, then the daughter's daughter; then the son's son's daughter; then the daughter's daughter's daughter; then the full sister; then the half sister by the father; then the half brother and sister by the mother; then the sister's children in the same order; then the paternal aunts; then the maternal uncles; then the maternal aunts, and the children of maternal uncles and aunts; and lastly, it devolves upon the Sultan, the Judge having the power of disposing of a person in marriage who requires a guardian for the purpose.
- 33. An executor has no authority to contract a boy or a girl in marriage, by whomsoever he may have been appointed. But, an executor who is also the natural guardian, can exercise such power.
- 34. When a guardian becomes permanently insane, his guardianship ceases.
- 85. When there are two guardians of equal degree, any one of them can contract a valid marriage, and the other cannot cancel it.
- **36.** A distant guardian cannot contract a marriage of his ward, if a nearer guardian be present and competent to act. But he can do so if the nearer guardian is absent or is incompetent.
- 37. A minor and a lunatic cannot marry without the consent of their guardians. Such marriage contracted with-

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out the guardian's consent can be cancelled by the guardian. The guardian of a minor or lunatic boy or girl can contract a marriage for them even against their will. But the minor on attaining majority, and the lunatic on becoming sane, can exercise the option of puberty and cancel such marriage. But when the father or grandfather contracts the marriage of a minor or lunatic, they cannot exercise that option and cancel the marriage. In other cases, the minor on attaining puberty, may either abide by the marriage or cancel it, and the rule is the same with regard to lunatics, who can cancel the marriage on recovering sanity. When a separation takes place under the option of puberty, and the marriage has not been consummated, the woman has no claim to dower; but if the marriage were consummated, she is entitled to her full dower, even if she herself brought about the separation.

38. The marriage entered into by a sane and adult woman is operative without the consent of her guardian. No one, not even the Sultan, can lawfully contract a woman in marriage, who is adult and san, without her own permission. It any one contracts a marriage for her, it becomes valid if she assents to it; otherwise, it is null and void. The consent of an adult virgin is not necessarily required to be expressed in words. Such consent is presumed from her silence, laughing and even weeping. But the consent of one who is not a virgin, must always be expressed in words.

\*82. If an adult and sane woman marries a man who is not her equal in birth, wealth, religion or any other ground, such marriage is valid, but her guardian may object to it and move the Judge to effect a separation. But after the woman has actually borne a child to her husband, the guardians have no longer the right to cancel the marriage. If the marriage is annulled before consummation, there is no liability for dower; after consummation the wife is entitled to full dower.

40. If a woman should marry for less than her project dower, the guardian may object till the full amount of the dower is made up. If the husband fails to make up the full dower, and the guardian obtains a cancellation of the marriage, the

woman would be entitled to the amount of the specified dower if consummation took place, otherwise she has no dower.

- 41. A woman unequally matched by herself cannot refuse her person to her husband upon the ground of inequality.
- 42. A father can lawfully marry his young child to one who is not an equal, or at an improper dower, and such marriage is valid.
- 43. Marriage can also be effected by an agent on one side, or by agents on both sides, or by one who has been appointed as agent for both sides. The marriage contracted by an unauthorized person is effective upon the approval of the party for whom he acted.
- 44. A marriage agent can be appointed without any witnesses. The agent cannot contract his or her marriage with the principal, unless authorized in that behalf.
- 45. Shea doctrine.—The difference of the two schools with regard to the law of marriage may be summed up as follows:—
- (1) According to the Sunni law the contract of marriage must be for the lives of the parties; but, according to the Sheas, the contract may be either temporary or for life. The latter school recognizes, therefore, both permanent and temporary marriages.
- (2) According to the Sunnis, the words used in contracting marriage may be either plain or ambiguous. But according to the Sheas, the words must always be express. According to the Sheas, a marriage may be contracted by the use of the word "moota," which means enjoyment, and which effects a temporary or usufructuary marriage; but the use of the term is not lawful according to the Sunni school.
- (3) The Sunnis regard the presence of witnesses as essential to a valid contract of marriage, while the Sheas do not deem such presence to be in anywise necessary.

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- (4) According to the Sheas, a kitabiah woman, or one who belongs to any sect having a revealed religion, can be married in the temporary form, but she cannot he taken for a permanent connection as in the other school.
- (5) The Sheas do not make any distinction between valid and invalid marriages, all that are forbidden being void according to them.

#### Dower.

- 46. Dower is defined to be the property which is incumbent on a husband, as being named in the contract of marriage, or by virtue of the contract itself (even when not mentioned in the contract) in exchange for the usufruct of the marriage, and as a token of respect for the woman. It is generally called Muhr, or Deyn Muhr.
- 47. When no dower is specified in the contract, the law presumes it by virtue of the contract itself. Such dower is called the *muhr-i-mist*, or the proper dower.
- 43. Dower is confirmed and made binding upon the husband, (1) by consummation, (2) by valid retirement, and (3) by death of either party. It is in danger of dropping altogether by the wife's apostacy, or by her kissing her husband's son with desire. Such danger is removed by consummation. Valid retirement is such a retirement of the married couple, and in such a place, that there is nothing in decency, law, or health, to prevent their matrimonial intercourse. In law, such a retirement is held to be as good as consummation.
- 49. When a dower has once been perfected or confirmed, it does not drop, though a seperation should afterwards take place for any cause proceeding from the wife.
- 50. If, either the husband, or the wife, dies before consumnation, and there is a specified dower, the dower is confirmed by such death, and becomes payable as a debt due to the wife.

DOWER.

- 51. Dower is divided usually into two parts:—(I) Muajjal, or prompt, and (2) Movajjal, or deferred. The prompt dower is immediately exigiole, though it is customary to postpone its payment till any future period. The deferred portion is not exigible till the death of either party, or the dissolution of the marriage by divorce. Further, though a woman's dower be payable on demand (as when it is prompt), yet she is not obliged to sue for it immediately, nor in the lifetime of her husband.
- 52. There is no limit to the amount of the dower; but the lowest amount of dower cannot be less than ten dirhms. When the dower specified in the contract is less than ten dirhms, it must be made up to that amount.
- 53. The subject of dower can be anything which is property, and has a value, except the hog and wine, as these cannot be the property of a Mussulman. Besides, the subject of the dower must be something in existence at the time of the contract, and a dower cannot be left to be fixed at a future time.
- 54. The proper dower of a woman is to be determined with reference to women of the family of her father, being on a footing of equality with her in respect of age, beauty, understanding, and virginity. The mother does not belong to her father's family, and consequently no regard is to be paid to her mother's dower.
- 55. When the dower consists of something which his property, and of something which is not property, or of something lawful and something unlawful, so much of it is valid as is property and is lawful. When the whole is unlawful, the woman gets her proper dower.
- 56. When dower is left to be fixed by the wife or a stranger, not more than the *proper dower* can be fixed unless assented to by the husband. When left to be fixed by the husband, he can fix it at more than the proper dower.
- 57. If a man should make an addition to his wife's dower after the contract of marriage, such addition is valid, and is

भारती

binding upon the husband. Such addition is also confirmed by consummation, valid retirement or death, of either party. If separation takes place before it is confirmed, the addition becomes void.

- 58. The wife is competent to allow an abatement from her dower, and such abatement with her consent is valid.
- 59. If a man marries a woman for a certain dower fixed in private, and a larger dower is announced in public, then the amount agreed upon in private is taken to be the true dower. The larger dower is for mere reputation, and is known as sumut.
- 60. If a man marries two women in one contract for one dower (without specifying the amount for each), then each is entitled to get an amount out of the whole dower in proportion to her proper dower.
- 61. If one man gives his daughter or sister in marriage to another, on condition that the other will give him has daughter or sister in marriage in return, so that no dower is mentioned, then the marriages are valid, and each woman is entitled to her proper dower. Such marriage is called a Shagar marriage.
- 62. When dower has been mentioned in the contract, and the wife is repudiated before consummation, she is entitled to half the specified dower.
- or when there is a condition that no dower will be payable, and the wife is repudiated, the wife will get her proper dower, if the marriage is consummated, but if repudiated before consummation, or if either party dies, she will, in such a case, be entitled to get a present or mutat. When the dower has been fixed after the contract, and separation takes place before consummation, the wife gets a present only, and not half the dower fixed. In all such cases, the wife forfeits her right to the present also if the separation (before consummation) occurs from a cause proceeding from herself. In every case in which the contract of marriage requires a "proper dower," and separation

DOWER.

takes place before consummation, the wife would get a *mutat* or present; and, where there is no liability for *mutat*, there is none for half the dower, if dower has been specified.

- **64.** A mutat or present consists of three articles of dress, or their value in money. Such value may not exceed half the "proper dower," nor it be less than five dirhms.
- 65. A wife may make a gift to her husband of a portion, or the whole, of her dower, whether consummation has taken place or not, and no one can object to it.
- 63. If the wife makes a gift to her husband of the whole dower after taking possession of the same, and she is then repudiated before consummation, the husband would be entitled to demand back from her half the specified dower. But, if she made the gift before taking possession, and is then repudiated before consummation takes place, neither party gets anything from the other.
- 67. The wife is also empowered to make a gift of her dower to a stranger. If the stranger takes possession of the dower, and the wife is then repudiated before consummation, the husband may have recourse to her for half the dower.
- 38. If the wife sells her dower to her husband, and she is repudiated before consummation, the husband has a claim against her for half its value.
- 69. Dower is like a debt due by the husband to the wife, and it may be made the consideration for a transfer of property by the husband to the wife. Such a transfer belongs to the class of *Hiba-bil-Iwaz*.
- 70. Effects of non-payment of prompt dower.—
  A wife may refuse herself to her husband so long as the muajjal or prompt portion of her dower is not paid; and, her husband cannot lawfully prevent her trom going out of doors, or taking a journey, or going on a pilgrimage, so long as such payment has not been made. She may be removed by her father to any place, and the husband cannot objec, to it. So long as a very small portion of the prompt dower remains

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unpaid, the husband cannot exercise any control over the wife nor can he demand back from her what she may have already received.

- 71. When a young wife goes to her husband before payment of the dower, the person who had the power of keeping her before marriage, would have the right of taking her back to his or her house, and to refuse her to the husband, until he pays the dower.
- 72. When the parties have expressly agreed as to how much of the dower is to be muajjal or prompt, that part of it is to be promptly paid. When nothing has been determined by the parties upon the subject, both the woman and the dower mentioned in the contract are to be taken into consideration, as well as what is customary in order to determine how much of it should properly be prompt for such a woman, and so much will be the prompt portion of the dower. Where, it has been expressly stipulated that the whole is to be prompt, the whole is to be so, without any regard to custom.
- 73. What is customary.—A wife cannot claim the whole of her dower as exigible, while her husband is alive, where no specific amount has been declared to be exigible. In such case, it is customary to consider one-third of the whole as prompt, and two-thirds as deferred.
- 74. Where the whole of the dower is deferred to a known period, and the period has arrived, the wife cannot deny herself to her husband for the purpose of obtaining payment of the dower. But, according to Abu Yusuf, she can refuse herself.
- 75. Where part of the dower is prompt, and part of it is deferred, and the wife has obtained the prompt; or, where after the contract, the wife has allowed the whole of the dower to be deferred to a known term, she has no right to deny herself. In the second case, according to Abu Yusuf, she will lawfully refuse herself, so long as the payment is not made on the arrival of the term.

- 76. The postponement of the dower for a fixed period such as a month or a year, is valid; and the postponement is also valid, even if no period has been fixed. When the period has not been fixed, the dower becomes payable on death of either party, or upon repudiation or divorce taking place.
- 77. Invalid marriages.—When an invalid marriage has taken place, the parties should be separated; and if there has been no consummation, the wife will not be entitled to any dower. If there has been consummation, she will get either the dower specified (if any', or her "proper dower," whichever of the two be less; and when no dower has been specified, she will get her full "proper dower."

## Fosterage.

- 78. Fosterage is established by sucking within the proper period, which is within two years. Fosterage establishes consanguinity and affinity, and is a ground of perpetual illegality in marriage.
- 79. Fosterage is established between the suckling and the family of the woman who suckles. It is also established between two infants suckled by the same nurse. Thus: If a woman has a daughter of her own, and suckles two other infants, fosterage is established between them all. The woman's own daughter is the foster-sister of both the infants suckled by her, and the infants are foster-brothers or sisters, as the case may be.
- 80. To the suckling, both his or her foster-parents and their ascendents and descendants, either by natural descent or fosterage, are all prohibited in marriage. Thus, a man cannot marry his foster-mother's mother, or his foster-mother's foster-mother. If a woman nurses two infants in different periods, then they become foster relations, and their intermarriage is prohibited, as also in the family of each. Fosterage establishes not only consanguinity, but also affinity, so that whatever is prohibited by affinity, is also prohibited by fosterage.

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Thus, a man cannot marry his foster-father's wife (other than the woman who suckled). There are few exceptions to these general prohibitions. These are the following:—

- (i) It is lawful for a man to marry the sister of his son by fosterage. [The sister of his son by fosterage is either his son's foster-sister, or his foster-son's sister; or, again, his foster-son's foster-sister, all these are lawful to him.]
- (2) The mother of a man's brother or sister by fosterage is lawful in marriage. [Sister's foster-mother, foster-sister's mother, and foster-sister's foster-mother, are the three relations contemplated here.]
- (3) Brother's foster-sister and foster-brother's sister, are lawful in certain cases, where the foster relations are the children of the foster-father, by a woman other than the nursing woman.
- (4) Brother's mother by fosterage; the mother of the paternal or maternal uncle or aunt by fosterage; the mother of the nephew by fosterage; the grandmother of one's child by fosterage; child's aunt by fosterage: mother of the son's sister by fosterage; daughter of the child's brother by fosterage are all lawful for a man to marry.
- (5) A woman may [marry the following relations by fosterage:—her sister's father; her son's brother; niece's father; child's grandfather; child's maternal uncle.

# Divorce.

81. The dissolution of the marrige-tie by the use of special expressions, is called *talak* or divorce.

82. The separation of the marriage couple may proceed from different causes, such as,—separation for the husband's impotence or his being a eunuch; for either party exercising the option of puberty; for inequality; for insufficient dower for the husband's renouncing of *Islam*; for his imprecation; for the husband's renouncing of *Islam*; for his imprecation; for the postacy; for difference of country; for the marriage being an invalid one. All these forms of separation are in-

cluded in the general category of divorce, but they are not talak in the strictest sense of the term, which applies to such cases of divorce, as are effected by the use of special words.

- 88. Divorce is either revocable or irrevocable. When the separation is complete with out the completion of the *iddat*, it is called *irrevocable* (Bain) When there is not total separation so long as the *iddat* is not completed, it is *revocable* (Rajai).
- 84. Divorce is effected principally in two forms: (1) the sunni, or the form which is agreeable to the traditions; (2) the Badai, or the new and irregular form. The sunni form is again divided into two kinds—the Ahasan or the best, and the Hasan or good.
- 85. When a man gives his wife one revocable divorce in a *luhr* (or period between two occurrences of the courses) during which he has had no intercourse with her, and then leaves her for the completion of her *iddat*, such divorce is *Ahasan* or the best, and becomes irre vocable upon the completion of the *iddat*.
- 83. When a man gives his wife one repudiation in a tuhr (or the period between the occurrences of two courses), and then gives another repudiation in the next tuhr, and another in the third tuhr, and has no intercourse with her in any of the three tuhrs, the third repudiation makes the divorce irrevocable without the expiration of the iddat, which is nevertheless compulsory upon the woman. This is hasan or good divorce. The first and second repudiations are revocable, so that the wife may be re-called at any time before the passing of the third repudiation.
- 87. In divorce in the sunni form, it is necessary that the wife may not have been enjoyed nor repudiated during the courses immediately preceding the tuhr in which repudiation is to be passed. Further, the number of repudiations necessary in this form is the same, both for the enjoyed and the unenjoyed wife. But, an unenjoyed wife may be repudiated at any time, either in a tuhr, or during the actual occurrence of the courses.

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88. The badai or the rregular form of divorce is of two kinds: First, when a husband repudiates his wife three times in one tuhr, either in one sentence or in different sentences, or joins two repudiations in one tuhr, and gives a third in the next tuhr. This is irregular in respect of number. Secondly, if he repudiates an enjoyed wife, either at a time when the courses are actually on her, or during a tuhr in which there has been sexual intercourse. This is irregular as regards time. The badai form, though effective, causes the divorcer to incur sin, and he ought to revoke the divorce before it becomes irreversible. In the first class of badai divorce, the divorce becomes irrevocable as soon as the third repudiation is given, without waiting for the completion of the iddat. In the second class, the divorce does not become irrevocable until after the expiration of the iddat.

89. In order that the divorce may be effectual, it is necessary that the husband be sane and adult. A divorce is valid even though it were uttered in jest or sport, or by a slip of the tongue, or by mistake, or without comprehending the meaning of the words used. Repudiation given by a youth under puberty, though possessed of understanding, that given by a lunatic when in a fit of insanity, that given by a man in sleep, are not effective, unless confirmed by them after attaining majority, or regaining sanity, or on waking, respectively. The repudiation by a drunken man is effective, unless he was intoxicated against his will, or for some necessary purpose. The repudiation by a dumb man expressed by signs, is effective. The repudiation given by an apostate, or by one who has joined a hostile country, is without effect.

90. The words used in giving a repudiation are (1) sarih or plain, and (2) kinavat or ambiguous. The plain words are sufficient of themselves. The kinavat or ambiguous words are effective when the man's intention to divorce can be inferred from them.

91. One irrevocable divorce cannot be added to another, so that, when the wife is irrevocably divorced by the first repudiation, a second would be unnecessary as it would be

without effect. A wife who has not been enjoyed, that is, with whom consummation did not take place, is irrevocably divorced by a single repudiation.

- **92.** Repudiation may also be given in *writing*. A husband may authorize a third party to repudiate his wife on his behalf. He may also commit to the wife the power of repudiating herself.
- 93. When a man has repudiated his wife by one or two revocable repudiations, he may retain her while she is still in her *iddat*, whether the wife be willing or not. Thus to recall a wife in the former matrimonial condition is called *rajat*.
- 94. Rajat is also of two kinds: sunni or badai. The sunni form of recalling is effected by means of speech, by the calling of witnesses, and by intimating it to the wife. Otherwise, it is badai or irregular. If the wife is retained by deed, as by having intercourse with her or kissing her while she is in her iddat, such retention is irregular and abominable. The right to retain a wife expires on the completion of the full term of iddat.
- 95. A woman repudiated irrevocably by her husband cannot be lawfully remarried to him, unless she is married to another husband, who consummates with her, and is then separated from him either by his death or by repudiation.
- 96. IIa.—When a husband makes a vow to abstain from his wife, and does not approach her for the period of *four* months the wife would be irrevocably divorced by one repudiation at the expiration of that period. This is called divorce by *IIa*.
- 97. Khoola.—When the husband gives a release to the wife from the marriage-tie, by accepting an exchange, and with the consent of the wife, such release is called divorce by khoola. Khoola is brought about by the disagreement of the married parties. When the wife seeks for the release, she must ransom herself from her husband with property, in consideration of which he is to give her a khoola. When the

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aversion is on the part of the husband, it is not lawful for him to take anything from her in exchange for the khoola; but if he should take it, the legal effect of the khoola would be still valid. When the aversion is on the part of the wife, it is abominable to take more than her dower, though not unlawful to do so. In khoola one irrevocable divorce taken place. Khoola does not occasion a release of any other debts than dower.

- 88. Mubarat.—When the parties seek mutually their release from the marriage-tie, the divorce is called *mubarat*. The same incidents are applicable to it as in *khoola*.
- 99. Zihar.—When a man compares his wife or any part of her to a part, which he cannot lawfully see, of a woman that is perpetually prohibited to him, the wife is perpetually prohibited to the husband. Thus, if a man says to his wife "Thou art to me as the back of my mother," that is called zihar. The effect of zihar is to make unlawful any matrimonial intercourse between the parties, till expiation is made.
- 100. Lian or imprecation means attestations confirmed by oaths on both sides, when a man accuses his wife of adultery, and the wife demands that he should take the lian or oath. The husband first should bear witness four times, saying each time. "I attest by God that I was a speaker of the truth, when I charged her with adultery," and he should say the fifth time, "The curse of God be upon me, if I have spoken the lie." The wife should then bear witness four times, saying, "I attest by God that my husband is a liar in accusing me of adultery," and should say the fifth time, "The wrath of God be upon me if he be a true speaker in the charge of adultery." When both parties have taken the lian (oath), the Judge would decree a separation. But, so long as separation is not decreed by the Judge, the marriage subsists, though marrimonial intercourse would be unlawful between the parties.
- 101. The separation by tian amounts to an irrevocable divorce. It the husband retracts before taking the oath, by declaring that he iled, intercouse would again become lawful.
- 402. Separation on account of the husband being a curuch, or impotent, can only be decreed by the judge.

Impotency is no ground for cancellation of the marriage, if there had been matrimonial intercourse and the husband became weak subsequently. The case should be adjourned for a year before separation can be decreed, in order to ascertain if there has been intercourse or not in the interval.

- 103. Shea School.—The important differences between the repudiation of the two sects are:—
- (1) The sunnis recognise both the sunni, or the regular form and the badai, or the irregular form of divorce. The Sheas recognise only one form—the sunni, or regular, and reject the badai form as being void with them.
- (2) The words used in repudiation are distinguished by the Sunnis as being either express or ambiguous. The Sheas admit the express words only as constituting repudiation.
- (3) When express words are used, the Sunnis do not require intention; but, according to the Sheas, intention is essential in constituting divorce. If a man is compelled to use express words of repudiation, the repudiation would be valid according to the Sunnis, but void according to the Sheas, forwant of intention.
- (4) According to the Sheas, the presence of two witnesses is necessary for the validity of a repudiation; the Sannis do not require any witness.
- (5) The Sheas recognise a new form of divorce unknown to the other school, which is termed the Talak ul-iddat, or the repudiation of the iddat, by which the repudiated wife is for ever rendered unlawful to her husband, so that it is impossible for them ever to marry with each other again. It is effected by repudiating a wife under the requisite conditions; then recalling her before the expiration of the iddal and having connubial intercourse with her; then repeating the repudiation in another tuhn and recalling her again to bed; and lastly, repeating the divorce in a third tuhn.

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#### Iddat.

104. *Iddat* means the waiting for a definite period, which is incumbent on a woman after the dissolution of the marriagetie.

105. On whom iddat is incumbent.—In cases of valid marriage, (1) upon divorce after consummation or valid retirement; and (2) upon the death of the husband. In cases of invalid marriage, when the separation is made after consummation. In cases of separations without repudiation, such as, when the marriage is cancelled by either party exercising the option of puberty, or by reason of inequality, iddat would be incumbent in the same way as in divorce, that is, it would be necessary if there had been consummation or valid retirement.

108. Iddat is not incumbent for connection under a marriage contracted by an unauthorized agent; nor for zina, or fornication; nor for illicit intercourse.

107. On whom not incumbent.—*Iddat* is not incumbent on four women; (1) a woman who is repudiated before consummation; (2) a woman who comes under protection in an *Islam* country, leaving her husband in a hostile country; (3) two sisters married by one contract which is cancelled; (4) more than *four* women married together in one contract which is dissolved.

of different women, as also in different cases:

(1) For a noman who is subject to the monthly courses, the *iddat* is for *three* terms of the courses, whether the separation has taken place by an irrevocable or revocable divorce, or without any repudiation.

(2) The *iddat* of a young woman, as also of an old one, who is not subject to menstruation, is three months.

(3). When a woman observing *iddat* by *months*, menstruates, before the completion of the *iddat*, she must begin the *iddat* anew, and observe it for three terms of her courses from the time of their appearance.

- (4) When a woman has been consummated under an invalid marriage, she is to observe the *iddat* for three terms of her courses, or for three months, according as she is subject to the courses, or otherwise.
- (5) The *iddat* of a pregnant woman continues till her delivery, whether the marriage has been dissolved by repudiation, or by the husband's death, or otherwise.
- (6) The *iddat* of a woman, incumbent for the death of her husband, is *four months* and ten days, whether she is subject to menstruation or not, and whether her marriage has been consummated or not, provided she be not pregnant at the time, in which case the *iddat* lasts till delivery.
- 109. A woman observing the *iddat* should not go on a journey. She should remain in the house where she was residing at the time when the occasion for the *iddat* took place. When a woman is observing the iddat for separation, either from divorce or otherwise, she should confine herself to the house, and should not go out by day or by night. But a widow may go out by day, and by part of the night, but she ought not to sleep out of the house.

### Parentage.

- 110. Maternity, or the descent of a child from its mother, admits of positive proof, for the child's separation from the mother can be seen, and the testimony of one woman even would suffice to establish it. The identification of the child is the only question in issue.
- 111. Paternity, or the descent of a child from its father, does not admit of positive proof. It may be established by the father's own testimony, or by a legally constituted relation between the father and the mother of the child.
- 112. The child born out of a valid marriage, during the subsistence of the marriage, is undoubtedly the child of its mother's husband; provided it was born after six months from the date of marriage or within two years from the husband's

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death or his separation from his wife. The reason for it is that according to Mahomedan law, the shortest period of gestation in the human species is six months, and the longest term is two years. So that, if a child is born within six months from the day of marriage, the conception must be presumed to have taken place before the marriage, and the child's paternity will not be established. The longest period of gestation, which is two years, though apparently against physiological truth, is to be explained in this way: If a woman shows signs of pregnancy within the usual period after her separation from the husband, the law presumes that the child may remain in the womb for two years and no more. So that, when a child is born to a woman very near two years from her separation or from the husband's death, the question for determination will be whether the symptoms of pregnancy appeared within the usual period after the separation or the husband's

- 113. If a man commit fornication with a woman, who thus becomes pregnant, and the man then marries her, and she is delivered of a child after such marriage, the paternity of such child will not be established in the man unless he expressly claims it.
- 114. The paternity of a child born of a woman, on whom it is not incumbent to observe an *iddat*, is not established in her husband, unless the child is born within six months from the date of separation.
- 115. The paternity of a child born of a woman, who is bound to observe the *iddai*, is not established in her husband, unless the child is born within two years from separation.
- 116. If the husband should die leaving his wife, whether before or after consummation, and the wife subsequently gives birth to a child, the paternity of such child would be established in the deceased husband, if born within two years from his death. If born after two years from the husband's death, its paternity will not be established.
- 117. When a woman has been irrevocably divorced, and her husband has connection with her while she is in her

iddat, the paternity of the offspring will not be established from him; even though he should claim it. But if the repudiation was by the use of ambiguous expressions, and the husband would claim the offspring, its paternity would be established.

regard to five relations:—his father, mother, child, wife, and mowla (master). The acknowledgment of a woman is valid with regard to four persons—her father, mother, husband, and mowla. A woman's acknowledgment with regard to a child is not valid, unless her husband assents to it. Mere acknowledgment is not sufficient to establish relationship, when the acknowledger is suing the acknowledged for property. Thus, where a woman sues a man for maintenance, declaring herself to be his wife, her acknowledgment would not suffice to establish the relationship of husband and wife.

119. The acknowledgment, by a man of a child is valid under the following circumstances:—

First, the ages of the acknowledger and the acknowledged must be such as to admit of the former being the parent of the latter.

Secondly, the descent of the person acknowledged must not be already established from another individual. That is the person acknowledged must not be known to be the child of another person.

Thirdly, if the person acknowledged is not a mere infant and is able to give an account of himself, he must confirm the acknowledger in his acknowledgment. A mere infant is not able to give an account of himself, and in his case confirmation is not necessary. But if the child acknowledged is able to give an account of himself, he must confirm the relationship acknowledged.

120. The acknowledgment by a man or woman of his or her parent, is valid, when the ages of the parties are such as to admit of the acknowledger being the child of the person acknowledged, when the acknowledger, has no known parents, and the person acknowledged confirms the relationship by consent

121. The acknowledgment by a man of a woman as his wife, would be valid if assented to by the woman, and there be no legal prohibition against the woman becoming his wife.

122. The acknowledgment by a man of another as his brother, or uncle, or the like, is not valid, so as to entitle the person acknowledged to inherit with his other heirs. But the acknowledgment would entitle him to maintenance as against the acknowledger himself during his life; and if the acknowledger has no other heir, the acknowledged brother, or uncle, would inherit from him; but not from any other person.

123. The acknowledgment by a woman of a child can be valid if her husband confirms the acknowledgment. If the woman be a widow, or has no known husband, her acknowledgment of a child is valid. Except in the case of her acknowledgment being confirmed by her husband, a woman's acknowledgment of a child does not create any legal relation between such child and any other person except the acknowledger. Such child inherits from the acknowledger alone.

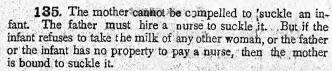
124. The fact of a man and woman having constantly lived together as husband and wife, and the fact of their children having lived as legitimate children with their parents, would raise a presumption of the children being the legitimate issues of their parents, unless proved to the contrary.

125. Shea School.—According to the Sheas, either paternity or maternity will not be established unless the connection of the parents was a lawful one. The Sunnis regard maternity as being established by birth alone; whereas, according to the Sheas, the proof of the child being born out of lawful connection is necessary to establish that relation. An illegitimate child has no descent even from its mother, nor are there any mutual rights of inheritance between them Again, according to the Sheas, the establishment of paternity would also depend upon the marriage of the parents being lawful, autiess there is bena-fide error on the part of either party or of both, regarding their connubial relation.

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#### Maintenance.

- 126. Maintenance includes food, raiment, and lodging.
- 127. I. Maintenance of wives.—The husband is bound to maintain his wife, whether rich or poor, young or old, unless she is too young for matrimonial intercourse. When she is too young for matrimonial intercourse, she has no right to maintenance from the husband, whether she be living in his house or with her father.
- 128. An adult woman must live in the husband's house in order to be entitled to maintenance; but if the husband has not called upon her to remove to his house, she will get maintenance. If she refuses to remove to his house on the ground of her dower remaining unpaid, she will be entitled to maintenance. If the dower has been paid or is deffered, and she has no right to refuse to go to the husband, she will not be entitled to maintenance, so long as she does not remove to his house, if called upon to do so.
- 129. If the wife be rebellious, that is goes out from the husband's house and denies herself to him, she has no right to maintenance, so long as she does not surrender herself.
- 180. When a man has several wives, all are equally entitled to maintenance. But a wife whose marriage was invalid, has no right to maintenance.
- 131. In a marriage without witnesses, the wife has a right to maintenance.
- 182. A wife separated from her husband for any cause other than her own fault, is entitled to maintenance during iddat, whether the repudiation be revocable or irrevocable, and whether she be pregnant or not.
- 188. A widow is not entitled to maintenance, even while she is in her *iddat*, whether she be pregnant or not.
- 184. II. Maintenance of children.—A father is bound to maintain his young children, and no one shares the obligation with him.



136. A father is bound to maintain his male children, until they are strong enough to work for their own livelihood. When the male children are strong enough to work for their livelihood, though they are not yet adults, the father may set them to work. But he cannot hire his female children out for work or service.

187. The father is not bound to maintain his adult male children unless they are disabled by infirmity or disease, and have no property of their own. It is also incumbent on a father to maintain his son's wife, when the son is young, poor, or infirm.

138. The father is bound to maintain his female children until they are married, when they have no property of their own.

189. III. Maintenance of relatives.—A child in easy circumstances is bound to maintain his poor parents, and no one shares this obligation with the child. When there are both male and female children, the maintenance of both parents is on them alike. But a son is not obliged to maintain his father's wife, not being his own mother, unless the father is weak and helpless.

140. Grand-parents, whether males or females, and whether on the father's side or on the mother's side are entitled to maintenance on the sole condition of being poor.

141. The male relatives are entitled to maintenance if they are in infancy and poverty; or, if adults, they are infirm or blind, and poor. A *poor* female relative is entitled to maintenance, whether a child or adult.

142. The liability of a person to maintain poor relatives, is in proportion to his share in their inheritance (upon their death). This rule is applicable only among persons who are equal in respect of propinquity.

- 143. Among relatives within the prohibited degrees, the liability for maintenance is regulated—rst, by propinguity, and 2nd by inheritance. Thus, if a poor person has a father and a son's son, both in better circumstances, the father is bound to maintain him, being nearer in degree than the son's son. Similarly, when there are daughter's children and a full brother, the former are liable for maintenance on the ground of proprinquity, though the latter takes the inheritance. When a poor person has a parent and a child, both in easy circumstances, the child is liable for maintenances. When a poor person has a grand father and a son's son, they are both liable for his maintenance, in proportion to their share in the inheritance. So also, if there be the mother and grandfather; the mother and a full brother. A kindred who is not within the prohibited degrees, is not liable for maintenance.
- 144. Maintenance is not due where there is a difference of religion, except to a wife, both parents, grand-parents, a child, and a son's child.

# Pre-emption.

- 145. Shufa, or pre-emption, is the right to take possession of a purchased piece of land, for a similar of the price set on it to the purchaser. The person who claims the right is called the shufes.
- 146. The right of pre-emption is occasioned by the junction of the property of the *shufee*, with the subject of purchase.
- 147. The following conditions are necessary to maintain a cause for pre-emption:—
- (1) There must be a contract of sale, or of exchange; no right of pre-emption can arise out of gift, charity, inheritance, or bequest.
  - (2) There must be an exchange of property for property.
- (3) The thing sold must be land. Land, whether arable or pasture, whether covered with buildings or with gardens or

vineyards, may be the subject of pre-emption. A bath or a well may also be its subject. It matters not whether the thing be divisible or indivisible.

(4) There must be cessation of the seller's ownership in the thing sold. If the seller retains an option of taking back, there can be no pre-emption.

(5) There must be total extinction of all rights on the part of the seller. Thus, there can be no pre-emption in case of invalid sale.

(6) The pre-emptor must be the *owner* of the adjoining thing at the time of the purchase. If he be a mere tenant of the adjoining tenements, he cannot set up the right.

(7) There shall be no acquiescence on the part of the pre-emptor in the sale or its effects, either expressly or by implication. If the pre-emptor himself negotiated the sale, he cannot set up the right.

148. It is not necessary that the person claiming by right of pre-emption, shall be a Mussulman.

149. When property is taken under a right of pre-emption, it comes in the place of the original purchase, so that, whatever was established in the purchaser becomes established in the pre-emptor.

150. Moveables by themselves are not the proper objects for the right of pre-emption. When they are accessories to land or buildings, they are indirectly subject to such right.

151. If a mansion is sold by the side of a wakf, neither the appropriator of the wakf, nor the mulwalli, can have any right of pre-emption; for neither of them is the owner of the wakf, and pre-emption requires that the shufe shall be the owner of the adjoining thing.

152. If a mansion is given to a woman as her dower, it cannot be subject to pre-emption. But if the husband gives it saying. "I have given it to thee in exchange for thy dower," then it becomes subject to that right; for, here, it is not gift but exchange that takes place, and pre-emption arises in ex-change of property.

- 158. When partners make a partition of immoveable property held in partnership, the neighbour has no right of pre-emption.
- 154. When trees or buildings are purchased with a view to their removal, there can be no pre-emption. But if the ground on which they stand, is also purchased, pre-emption can be set up.
- 155. A sharik (or partner in the substance) is preferred to a khalit (or one who is a partner in the rights of a thing, as one enjoying a right of way, or a right of water), and a khalit is preferred to a neighbour. If any of them gives up his right, the person next in order is entitled to the purchase by pre-emption. If two persons are the joint owners of a mansion, and one of them sells his share, the right of pre-emption belongs in the first instance to the other partner, and after him, to the inhabitants in the street who are all khalits in the way.
- 156. In order to establish a right of pre emption, two things are necessary:—(1) There must be either a contract, or neighbourhood, on which the right is founded; and (2) demand for the thing sold. This demand is of three kinds First, when a person who is entitled to pre-emption has heard of a sale, he should claim his right immediately on the instant, whether there be any one near him or not. Second, the person should next invoke witnesses and make his demand in their presence, to attest his immediate demand. But, when there were witnesses to the first demand, this second demand with the invocation of witnesses would be superfluous, and so unnecessary. Third, the pre-emptor should then make his third demand, or demand for possession, which is done by formally litigating the matter in Courts of law.
- 157. It is not necessary that the pre-emptor should produce the money at the time of making his claim.
- 158. Where several houses are purchased by one contract, the pre-emptor may take one of them without the rest, if his right applies to that one alone. But where one house is purchased, he cannot take a part of it, and refuse the rest. If

one house is purchased by two or more persons, the preemptor may take the share of one of them. And, where two houses are purchased by one bargain, and the pre-emptor's right extends to both, he cannot take one of them without the other.

- 159. When there are several pre-emptors in respect of the same property, and their claims have equal grounds, they share the right equally.
- 160. If a decree for pre-emption is made in favour of one whose claim is more remote than another who has a nearer claim, and the latter appears after the decree and litigates his title, the original decree should be cancelled.
- 161. The right of pre-emption, after it has been established, may be rendered void in two ways. First, it may be rendered void voluntarily—if the pre-emptor uses such expressions as, "I have made void, or relinquished, or surrendered my shufa," or, if anything is found on the part of the pre-emptor that indicates his acquiescence in the sale. In the former instance, the right is cancelled expressly; in the latter, by implication. Secondly, the right is rendered void necessarily, when the pre-emptor has died, either before making the demand, or after making the first and second demands, and before taking possession. But the death of the purchaser does not cause the right to drop.
- 162. Legal devices by which the right of pre-emption may be evaded:—
- (1) By making a gift of the thing to the purchaser, who subsequently makes a gift of the price to the seller. Here, there is no contract of exchange, and the right does not extend to it.
- (2) By marking off and separating a part of a mansion or land from the remainder, and making a gift or charity of the portion so marked off, and then selling off the remainder. The part separated must be adjoining to the land or the house of the pre-emptor, and as that part is not sold, he cannot set up his right with regard to the portion sold, which is no longer ad-

joining to his land or house. It is also necessary that a right of way should be given along with the portion bestowed in gift or charity.

- (3) If the trees standing on land are sold with their foundations, the purchaser becomes a partner in the property; and, if then the land is sold to him, there can be no right of preemption in that case.
- (4) By ostensibly fixing a very high price, and secretly arranging for a low price, for the thing sold. If the pre-emptor contests his claim, he shall be liable for the ostensible price.
- (5) If the seller and the purchaser both declare that the sale was invalid, or if the seller retains an option of retaking the property sold.
- (6) If a small piece of land adjoining the pre-emptor's land is left, and the rest is sold, the right is evaded.
- 168. According to the Sheas, the right of pre-emption belongs only to a partner in the thing itself. There can be no privilege of pre-emption to a neighbour, nor in property that has been divided, unless the road or stream running through the property is still held in partnership. Moreover, it is a condition that the shuft, or the person asserting the right of pre-emption, be a Muslim when the purchaser is of that religion. An infidel shuft has no rights against a Mussalman purchaser. Again, according to this school, the right of shufa is extinguished by the shuft's inability to pay the price, and also by his delay to claim the privilege. The right is also hereditary like any other property.

#### Gift.

164. Hiba or gift means the conferring of some specific thing, or of a right of property in some specific thing, without an exchange.

165. Gift is constituted by the declaration of the donor, "I have given." It is completed by the act of the owner alone.

The acceptance by the donee is required for the purpose of establishing his property in the thing given. The legal effects of gift are not complete until possession is taken of the thing given.

184. Conditions of a valid gift:—(1) A gift must not be depended upon anything which is contingent; nor be referred to a future time. (2) The giver must be free, sane, adult, and the owner of the thing given. (3) The thing given must be actually in existence at the time of the gift, and must have legal value. (4) If the thing given be divisible in its nature, it should be actually separated from anything else which is not given. (5) The donee must take possession of the thing given in order to establish his right thereto.

167. The legal effects of gift are:—(1) It establishes a right of property in the donee, without being obligatory on the donor; so that the gift may be validly resumed or cancelled.
(2) It cannot be made subject to an option of stipulation.
(3) It is not cancelled by vitiating conditions. If such conditions are attached to a gift, the gift becomes valid, and the conditions void.

168. Lawful gifts:—1. The gift of a thing which is separated from the property and rights of the donor, is lawful.

2. The gift of a musha, or the undivided part of a thing that does not admit of partition, or is of such a nature that partition would destroy the benefits derivable from it, is also valid. But the gift of a musha, or undivided part, of a thing that is partible, is not valid, unless the portion given is separated from the rest before the done takes possession.

169. The gift of a musha, or undivided part, of a thing which does not admit of partition, is lawful if made to a partner, or to a stranger. But the gift of a thing which admits of partition, is not valid, whether made to a partner, or to one who is not a partner. When a gift is made of an undivided part of a thing which does not admit of partition, it is necessary for its validity that the quantity or share given should be determined, otherwise the gift will be invalid.

100.170. When two persons are the owners of a thing, and they both make a gift of it to one person, such gift is valid.

GIFT.

- 171. If property which admits of partition is given to two persons, or to a group of persons, the gift is valid.
- 172. If a person should give an *undivided* part of a thing that admits of division, and then make a partition and deliver the part, the gift would be valid.
- 173. The gift of debt to a debtor amounts to a release, and is valid even without his acceptance. The gift of a debt to a person other than a debtor is also valid.
- 174. Revocation of gifts.—The revocation of a gift is valid, though it is abominable. All gifts may be revoked before delivery of possession to the donee. But where the gift is made to a relation within the prohibited degrees, the donor has no right of revocation after delivery of possession.
- 175. Causes preventing revocation:—(1) The loss of the thing given. (2) If the thing given passes from the donee's property to another person, by sale, or gift, or the like, or by the death of the donee. When the thing becomes the property of the donee's heirs, there can be no revocation. (3) The death of the donor. (4) If the thing given has received an increment in the hands of the donee, and such increment is indivisible from the original. (5) When an exchange has been received for the gift, (6) When there has been a change in the subject of the gift, as when wheat is ground into flour. (7) When there is marriage relation between the parties, that is, when the donor and donee are husband and wife. (8) Relationship within the prohibited degrees. (9) The gift of a debt to the debtor cannot be revoked.
- 176. Until an order has been passed by a Judge for cancelling a gift, the done may use and dispose of the thing given.
- 177. Revocation being a cancellation, it follows that the thing given returns to the former state of property, and the donor's renewing his possession is not necessary in all cases. When revocation is effected neither by the Judge's decree, nor by mutual consent, but the donee gives back and the donor

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accepts the subject of the gift, it is necessary that the donor should take possession of the thing, unless it was in his own hands after the gift was made.

- 178. Gifts to minors.—A gift by a parent to the child, when the thing given is in the parent's possession, is completed by the contract of gift, and the formal taking possession of it by the donee is not necessary. But when the thing given is in the hands of another, the donee's possession would be required to make the gift lawful. When the donee is a minor, or insane, the right to take possession for him belongs to his guardian.
- 179. Gift by a sickman.—A gift by a sickman is not lawful, except when possession has been taken of the subject thereof.
- 180. A gift by a sick person, as also a charitable disposition of property by a sick person is valid to the extent of one-third of the sick person's property, if possession has been taken during his lifetime. But if the sick person dies before delivery of possession, they are both void.
- 181. A gift by a sick woman to her husband of the whole of her dower, is valid if she recovers from her illness, or if the illness she is suffering from is not her death-illness. A death-illness is such an illness that it is highly probable that death will be the result.
- 182. Sadka, or a gift in charity, is governed by the same laws as a proper gift, with this difference that a gift for charitable purposes cannot be revoked, whether the gift be made to the poor or the rich. Gift is not valid without verbal acceptance, but charity is valid without it.
- 183. Hiba-bil-Iwaz means a gift for an exchange, as when one person gives a thing to another, and the donee in this transaction gives something (which is other than the thing received by him) in return to the first donor, saying. "This is the twaz or badal, or in place of thy gift, then the second gift being expressly an exchange for the first, the transaction re-

GIFT.

sembles a sale in all its essentials and the parties have no right of revocation. If the second gift is not accompanied by the words quoted above, so as to signify that it is made in exchange for the first, then the transaction is not a "gift for an exchange." So that, if a person should give a thing to another, and the donee should take possession, and then make a gift of something to the donor, without saying that the gift was "in iwaz, or in exchange, of thy gift," the second gift would not be an exchange for the first, but a new gift, and each of the parties would have the right to revoke.

184. There are three conditions for a gift for an exchange: (1) The second gift must be expressly made as in exchange for the first, as explained above. (2) The subject of the first gift, or any portion of it, cannot form the subject of the zwaz. (3) The thing given in zwaz must be the property of the giver thereof.

185. In a "gift for an exchange," if the rives be void, the gift may be revoked, and when the gift is void, the rives may be revoked.

186. Hiba-ba-shart ul-Iwaz means a gift on condition of an *iwaz* or exchange. The *iwaz* or exchange is stipulated for in the contract of gift, which is not the case in *Hiba-bil-Iwaz*. In the latter, there is no condition of an exchange when the first gift is made; so that, if the second gift is not made at all, the first remains a gift in its pure legal character. In *Hiba-ba-shart-ul-Iwaz* on the contrary, there is stipulation for the exchange from the beginning. So that, each of the parties may refuse to deliver possession. But after mutual possession has been taken, the transaction becomes effective as a sale, and neither party may recall.

187. The principal difference between the two schools in the law of gift, is that the gift of an undivided share of a thing, which is invalid according to the Sunnix is quite lawful according to the Shear.

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#### Wills.

188. According to the Mahomedan law, bequests are valid to the extent of one-third of the testator's property. whether made orally or in writing. Wills may be made orally or in writing, and the presence of witnesses is not required in either case as a necessary formality. The words, "I have bequeathed," or any other words to that effect, constitute a bequest. No interest vests in the legatee without his acceptance after the testator's death. Both males and females, whether married or unmarried, are equally competent to make wills, provided that he or she be sane, adult, and free. A bequest can be made to any one, even to a child in the womb. A beguest to an heir of the testator is not valid without the assent of the other heirs. Legatees may be mentioned by name or by general description—the former must be in existence at the time of the bequest, the latter at the time of the testator's death. A bequest to a child in the womb is valid only if the child is born within six months from the time of the bequest.

189. Anything that is property may be the subject of the bequest. It is not necessary that the thing bequeathed should actually belong to the testator, or that it should be in existence at the time of the bequest. It is lawful to bequeath the substance of a thing to one person, and the usufruct of it to another; or the usufruct alone may be bequeathed, either for a definite term, or indefinitely. If the usufruct is bequeathed indefinitely, the legatee is entitled to enjoyment during his lite, though the profits should exceed a third of the testator's estate.

190. (1) An executor may be appointed by special words in the will, or by appointing one as the testator's agent. Acceptance in both cases is necessary, but it is not necessary that the executor should accept after the testator's death. An executor, who has once accepted, cannot withdraw from the office after the testator's death, though he may be relieved or dismissed by the Judge. An executor may take possession of whatever rights and properties belonged to the testator, and of anything that was in dejosit with the testator. He may exact and re-

ceive payments of debts due to him, make arrangement for the funeral, and pay debts and legacies. But if he pays debts without proof or in preference to some creditors, without the permission of the Judge, then he will be responsible to the other creditors. He may sell a part of the estate to a creditor in exchange for his debt. He may sell the whole of the testator's moveable property, and any portion of his immoveable property, for the payments of debts and legacies. He may do whatever is necessary for the preservation of the testator's property.

- (2) When all the heirs are minors, the partition made by the father's executor with a legatee, giving him a third and retaining the two-thirds for the heirs, such partition is valid in respect of both moveables and immoveables. But if some or all of the heirs are adults, and absent, the executor can make a partition, with a legatee, of moveables, but not of immoveables. When all the heirs are adults, or some of them adult and present, the executor cannot make any partition of moveables or immoveables with the legatee. And, a partition in all such cases in the absence of the legatee is invalid.
- (3) Partition by a father's executor among heirs (that is, where there is no legatee) is invalid if all the heirs are minors, and so also if some of the heirs are adults but absent. If all the heirs are adults, but some of them are absent, the executor cannot make a valid partition of immoveables. If some of the heirs are adults, and they are present, a partition would be valid.
- (4) A mother's executor may make a partition of moveables inherited from her, on account of her minor children, when there is no father nor father's executor. But he cannot make a partition of immoveables under any circumstances.
  - (5) A partition by the Judge is always valid.
  - 191. The conditions of a valid bequest are:
- (1) The testator should be competent to make a gratuitous transfer of property; accordingly, a bequest by an insane person is not valid:

- (7) The Wukf should be free from option:
- (8) Perpetuity is a necessary condition, and Wukf for a limited time would be void:
- (9) The ultimate end of the Wukf must be something that can never fail: the poor are always to be implied when other objects fail.
- (10) The subjects of appropriation should be lands, houses, and shops, or immoveable property generally, and any moveables that may be attached to it. The appropriation of Korans, of beasts of burden, and of weapons of war, is valid.
- 202. Appropriation may be constituted by words intervivos, or by bequest But when it is constituted by bequest, the property which is the subject of it, must not exceed one-third of the testator's estate, unless the excess is assented to by the heirs.
- 203. The Wukf of a musha, or undivided portion, of property that does not admit of partition, is valid without any difference of opinion.
- 204. The income of Wukf is to be expended in the first place on necessary repair; next, if any thing has been specified by the appropriator, the income must be applied to that immediately after the repairs, otherwise it should be expended on such things as are nearest or most essential to the general purpose of the appropriation.
- 205. An appropriation for the kindered or the prophet, or for poor travellers, is valid. Appropriation for the purpose of performing the *hajj* every year, or bestowing in charity, or paying his debts or religious wars, or shrouds for the dead and for digging their graves, is lawful. But an appropriation for the rich alone is not lawful.
- 206. Appropriation is generally divided into two classes,—the one for religious or charitable purposes, called *Endourments*, and the other for the benefits of the appropriator himself, his children, kindred, or neighbours, called *Settlements*.

- 207. If a man settles his land on himself, and after him, on such a one, and then upon the poor, the parties take in succession. But if he settles upon himself and upon such a one, they take simultaneously.
- 208. If a man settles his property upon his child, and the child of his child, only two generations will take the estate. But when three generations are mentioned, or the settlement is made on "his children," all generations are included, and the produce is to be expended on his children for ever, so long as there are any descendants.
- 209. A Wukf with a condition that the whole or part of it shall be for himself while he lives, and after him for the poor, is valid.
- 210. When there is a condition in the Wukf that the appropriator may exchange the land for other land as he pleases, and that the land so exchanged shall be Wukf, the Wukf and the condition are both valid.
- 211. Without any express condition in the Wukf, the land cannot be sold or exchanged. It may be sold by the Judge, if it be useless.
- 212. A Wukf with accondition that the appropriator may apply the produce as he pleases, is lawful.
- 213. The appropriator may appoint himself or his child ren, or any other person to be the governor of the Wukf property. But he cannot resume the Wukf after appointing another, unless there has heen an express condition to that effect.
- 214. On the death of the Superintendent, the appointment of his successor belongs in the first place to the appropriator, if he be alive, or to his executor; failing them, the appointment rests with the Judge. A Superintendent may at death commit his office to another.
- 215. A Superintendent cannot sell or pled to the Wukt

- 216. An appropriation by a sick person in his deathillness is valid to the extent of a third of his property. If the Wukf exceeds a third, the excess will not be valid unless his heirs assent to it after his death.
- 217. When a person erects a masjid, his property in it does not abate till he has separated it from the rest of his property, makes a way to it, and permits prayers to be said in it.

218. Nothing can be a masjid in which any one has a right of property.

219. A space of ground may be constituted a masjid by public worship on it, under a perpetual permission from the owner.

220. Though a masjid falls into decay, it cannot be sold.

#### Inheritance.

- 221. The estate of a deceased person is applicable to four different purposes:—(1) his funeral; (2) his debts; (3) his legacies; and (4) distribution among his heirs according to their respective rights.
- 222. The funeral is to be performed in a manner suitable to the condition of the deceased, without superfluity of expense, and without deficiency. For the necessary expenses of the funeral and burial, the whole of a man's property is liable, except property in the hands of the pledgee.
- 223. Next, the whole of his remaining assets may be liable for the payment of his just debts.
- 224. Thirdly, legacies are to be next paid out of a third of what remains after the payment of funeral expenses and debts. Legacies beyond a third of the testator's estate cannot be paid unless the heirs assent to it.
- 225. Lastly, the residue remaining after the payment of the above charges, is to be divided among the heirs according to their shares in the inheritance.

- 226. There are three different kinds of heirs—the sharers, the residuaries, and the distant kindred.
  - 227. The succession devolves in the following order:
  - 1. The sharers take according to their appointed shares:
  - 2. The residuaries, who take the residue remaining after the allotment of shares:
  - 3. If there are no residuaries, the residue returns to the sharers by the principle of return:
  - 4. The distant kindred:
  - 5. The successor by contract:
  - 6. The acknowledged kindred:
  - 7. The legatee to whom the whole has been left by will:
  - 8. The Public Treasury.
- 228. The SHARERS are persons for whom shares have been appointed in the stored texts. They are twelve persons: four males, and eight females. The four male sharers are the father, the true grandfather (or any male ancestor in the direct paternal line, how high soever), the brother by the same mother, and the husband. The eight female sharers are—the wife, the daughter, the son's daughter (or any female descendant, how low soever, in the direct male line, as, a son's son's son's daughter) the whole sister (that is, the sister by the same father and mother), the sister by the father's side, the sister by the mother's side, the mother, and the true grandmother.
- 229. The TRUE GRANDFATHER is any male ascendant who is related without the intervention of a female ancestress. The father's father's father is a true grandfather; but a father's mother's father is a fake grandfather, as he is related through a female—the father's mother.
- 280. The TRUE GRANDMOTHER is one who is related to the deceased without the intervention of a false grandfather. The mother's mother, the father's mother, the mother's mother's mother, the father's father's mother, the father's father's

mother, are all true grandmothers. The mother's father's mother is a false grandmother, as she is related through the mother's father, who is a false grandfather. Similarly, father's mother's father's mother, mother's mother's father's mother, are false grandmothers.

281. The false grandfathers and grandmothers are not sharers. They may inherit as distant kindred.

282. The SHARRS, appointed in the book of Almighty God are six: a moiety, a quarter, an eighth, two-thirds, one-third, and a sixth.

233. The FATHER inherits in three casss—1st, as a sharer, andly, as a residuary; and, 3rdly, both as a sharer and a residuary. When there is a son, or son's son, h. P. s., of the deceased, the father inherits as a sharer, and takes his absolute share, which is ONE-SIXTH. When there is no successor but himself, or when there are no children, or son's children, or other low descendants of the deceased, the father inherits as a residuary. If there is no successor beside himself, he takes the whole; or, if there be a sharer, he takes the residue after the sharer has taken his or her appointed share. Thus, if there be the husband or the wife, and the father, the father will take the residue after the husband or the wife has taken his or her legal share. Lastly, if there be, with the father, a daughter, or son's daughter, how low soever in the degree of descent, the father takes first his legal share, one-sixth, and then the remainder after the daughter or son's daughter has taken her legal share. The father is never excluded.

234. The TRUE GRANDWATHER inherits in the absence of the father. He is totally excluded by the father, if he be living. The true grandfather's rights to the inheritance are the same as those of the father, as described above.

235. The HALF BROTHER BY THE MOTHER inherits as a sharer, provided there is no father, nor grandfather, nor children, nor son's children of the deceased. His share, when there is but one, is a sixth. Two or more of such half brothers together inherit to a third, which is equally divided among

them all. If there be both brothers and sisters by the same mother, they would share the *third* in equal division without any difference between males and females.

- 23c. The HUSBAND takes a half, on failure of children and son's children; and a fourth, if there be children or son's children, how low soever, of the deceased. The husband is never excluded.
- 237. Wives take in two cases: a fourth, is the share of one or more, on failure of children and son's children, how low soever. If there be children and son's children in any degree of descent, the share of the wife or wives is one eighth. The wife is never excluded.
- 288. The DAUGHTER, when she is alone, takes a half; two or more daughters together inherit to two-thirds. When there are both sons and daughters, the sons make the daughters residuaries with them, the share of each son being equal to that of two daughters.
- 239. The son's DAUGHTERS inherit like daughters, in the absence of sons and daughters of the deceased, half being the share of one, and two-thirds, the share of two or more of them. When there is a son, the children of a son take nothing. When there is one daughter with the son's daughters, the single daughter takes a half as her legal share, and the son's daughter or daughters take one-sixth. When there are two or more daughters of the deceased, they take two-thirds, and the son's daughters get nothing, unless there be a son' son in an equal degree with, or of lower grade than themselves in which case the son's son will make them residuaries with himself, each son's daughter getting half the share of the son's son. Thus, if there were two daughters, a son's daughter, a son's son's daughter, and a son's son's son-the daughters would take two-thirds, and the remainder one-third will be divided among the son's daughter, and son's son's daughter, and the son's son's son, in the proportion of two parts to the male, and one part to each female. The principle in such case is, that the son's daughter. when she is not a sharer, becomes a residuary with a son's son, whether he is in the same or a lower

or sister, the mother takes one-third of the whole with the husband or wife, even if there be a grandfather of the deceased; but if there be a father instead of the grandfather in the same case, she takes a third of the remainder after allotment of the husband's or wife's share.

246. The true grandmother takes a sixth, whether she is on the father's or the mother's side, and whether there be one or more. When there are several true-grandmothers, all in the same degree, they partake of the sixth in equal division. The false grandmothers may inherit as distant kindred, but they are never sharers.

247. The true-grandmothers of either side are all excluded by the mother. The paternal female ancestors are also excluded by the father. The paternal grandfather excludes all grandmothers on the father's side, except the father's mother who is in the position of his wife, and this exception holds good even if the father's mother be a relation how high soever, so long as she is not related through the grandfather. Thus, the father's mother's mother will be excluded by the father's father. but not by the father's father's father, because in the former case she is related through the father's father, and in the latter instance she is of the same degree with the father's grandfather. and stands in the position of the father's father's mother. Again. the nearest grandmother, or female ancestor, on either side. excludes the more distant grandmother, on whichever side she be, even if the nearer grandmother be herself excluded by any other heir. Thus, the father's mother excludes the mother's mother's mother, even if the father's mother be herself excluded by the father. When there are two grandmothers, one of whom is related to the deceased on both sides, and the other only on one side, then according to Abu Yusuf, the sixth is to be divided between them equally.

248. Summary of the shares and their distribution among the sharers:—

when A half is the share of five persons, of the husband when there is no child or son's child of the deceased; of a single daughter; of a single son's daughter, when there is no daughter;

of the full sister, and of the sister by the father's side when there is no full sister.

A fourth is taken by two persons—by the husband when the deceased has left a child or son's child; by the wife or wives, when there is no child nor son's child.

An eighth is taken by one person,—by one or more verves when the deceased has left a child or son's child.

Two-thirds belong to four different persons,—it is the share of two or more daughters; of two or more son's daughters when there are no daughters; of two or more full sisters; of two or more sisters by the same father, when there is no full sister.

A third is the share of two persons,—of the mother, when there is no issue of the deceased, nor two or more brothers and sisters; of two or more brothers or sisters by the same mother.

A sixth is the share of seven different persons—of the father when there is a child or son's child of the deceased; of a grandfather when there is no father; of the mother when there is child or son's child of the deceased; or two or more brothers or sisters of the deceased; of the grandmother whether single or several; of a son's daughter when existing with a single daughter of the deceased; of a single brother or sister by the same mother; of sisters by the father's side when existing with a single full sister.

### Residuaries.

- 249. The residuaries are all persons for whom no share has been appointed, and who take the residue after the sharers have been satisfied. They would take the whole easate when there are no sharers.
- 250. The residuary heirs are principally of two classes; residuaries by reason of consanguinity or kindred to the decreased; and residuaries for special cause.

251. The residuaries by consanguinity are, again, divided into three classes: residuaries by themselves, or in their own right; residuaries in another's right; and residuaries together with another.

252. The residuary in his own right is every male into whose line of relation to the deceased no female enters. This class of residuaries are of four sorts—1) the offspring of the deceased; (2) his root; (3) the offspring of his father; (4) the offspring of his grandfather. The offspring are the descendants; his root include the ascendants—the father and the paternal grandfather how high soever; the offspring of his father and of his grandfather are the collaterals. The descendants succeed first, then the ascendants, and after them the collaterals

253. The order of succession among the residuaries in their own right is regulated by two rules viz: (2 According to proximity of degree, that is, the nearest is entitled to succeed first, and then the nearest after him; (2) The strength of consanguinity prevails, that is a relation of the whole blood is preferred to one of the half blood. "Surely kinsmen by the same father and mother shall inherit before kinsmen by the same father only." Hence—

254. The nearest of the residuaries is the son; then the son's son, how low soever; then the father; then the father's father, how high soever; then the father's offspring-(1) the full brother, and after him (2) the half brother by the father, (3) then the full brother's son, (4) then half brother's son, (5) then their sons, how low soever, in the same order, that is, the whole blood being preferred to the half blood, and the nearer excluding the more remote. Then the gtandfather's childrenfirst, the full paternal uncle, then the half paternal uncle, then the son of the full paternal uncle, then the son of the half paternal uncle, and then the succession devolves upon the descendants of the sons of the full and half paternal uncles in the same order. Then, failing the offspring of the paternal grandfather, the offspring of the father's grandfather succeedthe father's full paternal uncle; then the father's half paternal uncle; then the sons of the father's full and half paternal

uncles, and their sons in the same order; the paternal uncle of the grandfather and his sons how low soever. The succession of the collaterals in unlimited. It should be remembered that the half relations among the collaterals are all on the father's side.

- 255. when there are several residuaries in the same degree, they inherit per captia (by bodies), and not per stripe (by families. Thus, when there is a son of one brother and ten sons of another, the property is divided into eleven shares, of which each takes one share.
- 253. The residuaries in another's right are certain females who are made residuaries by a male of parallel grade. In the absence of the males of equal grade, these females inherit as sharers, but they become residuaries when with them. They are four in number:—(1) A daughter, made a residuary by a son's son; (2) A son's daughter, made a residuary by a son's son; (3) A full sister, made a residuary by a full brother; (4) A half sister by the father, rendered a residuary by her brother.
- 257. A female who has no share among females, and whose brother is an heir, does not become a residuary in her brother's right. Thus, the paternal aunt is not a sharer, and she does not become a residuary with her brother, the paternal uncle, when the latter becomes an heir. Similarly, the brother's daughter does not become a residuary with the brother's son.
- 258. The residuary together with another is every female who becomes a residuary with another female; as full sisters or half sisters (by the father's side) are rendered residuaries by daughters of the deceased.
  - 259. When there are several residuaries of different kinds—one a residuary in his own right, a second a residuary in another's right a third a residuary with another—preference is given to the one who is nearest to the deceased. Thus, if a man leaves one daughter, one full sister, and a brother's son—the daughter takes a half, and the sister takes the residue, the other half, and nothing is left for the brother's son.

260. The residuaries for special cause are the emancipator of a slave, and after him, his own male residuary heirs in the above order.

### The Distant Kindred.

261. The distant kindred are all relatives who are neither sharers nor residuaries. They are entitled to inherit when there are no sharers nor residuaries. They take the inheritance like the reiduaries, in somuch that when there is only one of them he takes the whole property.

262. The distant kindred are of four classes :-

First class: The first class comprises the children of daughters and son's daughters, how low soever.

Second class: The second are the false grandfathers and false grandmothers, how high soever.

Third class: These are the chirdren of all sisters, the daughters of all brothers, the children (sons and daughters) of half brothers by the mother. [It should be remembered that sons of full brothers and of half brothers by the father are among the residuaries.]

Fourth class: These are the paternal uncles by the father's mother's side (that is, the half brothers of the father by his mother's side), and their children; paternal aunts, and their children; maternal uncles and aunts, and their children; the daughters of full paternal uncles, and the daughters of half paternal uncles by the father's father's side (that is, the daughters of father's half brothers by his father's side), and the children of such daughters.

These, and all that are connected to the deceased through these persons, are among the distant kindred.

263. The order of succession among the several classes is that the first class is first in the succession, though the individual claimant should be more remote than a claimant of

another class. The second class succeeds next; then the third; then the fourth. None of the second class can inherit, though nearer to the deceased, while there is a kindred of the first class, though the latter be more remote; and in like manner, none of the third class would inherit so long as there is an individual of the second class, and none of the fourth class would take anything whilst there is one of third class.

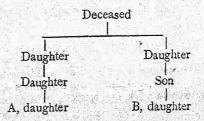
264. The rules of succession among claimants of each class are—

## 265. Among kindred of the first class:

First: The nearer to the deceased is preferred to the more remote. Thus, if there be a daughter's daughter, she will be preferred to a son's daughter's daughter, as the latter is more remote than the former.

Secondly: If the claimants are equal in degree, then the child of an heir is preferred to the child of a distant relation. Thus, the daughter of a son's daughter is preferred to the son of a daughter's daughter; for the son's daughter being an heir, her daughter is to get preference.

Thirdly: If the claimants are all equal in degree and there is none among them who is the child of an heir, or all of them be the children of heirs, and the ancestors of these claimants were all of the same sex, that is, their ancestors were either all males, or all females, then if the claimants are all males or all females, they would get equal shares in the inheritance; and if some of the claimants be males and some females. then each male shall have twice the share of each female. Thus, if there be three daughters' daughters, or three sons of daughters, they would have equal shares; and if there be two sons of a daughter, and two daughters of another daughter. then each daughter's son will get twice as much as each daughter's daughter. But if the ancestors of the claimants be of different sexes, there is a difference of opinion among the learned. According to Abu Yusuf the distribution will still be the ame as before, that is, the distribution will be made by considering the sexes of the claimants—the male being awarded double the share each female. But, according to Muhammad, it is only the number that is to be taken from the individual claimants, and the quality of the sex is to be taken from the generation in which the difference of sex first appears. Thus, if a man leaves the daughter of a daughter's daughter, and the daughter of a daughter's son—



Here, according to Abu Yusuf the division will be in halves. each of the claimants getting a moiety; but, according to Muhammad, the difference of sex in the second generation is to be taken into consideration. The distribution is first to be made among 'tte daughter's son and the daughter's daughter. the former getting two shares and the latter one share, according to the rule that the male has double the share of each female. Then the two shares inherited by the daughter's sonare passed to his daughter, B, and the one share awarded to the daughter's daughter is passed to her daughter, A. Thus. according to Muhammad the distribution is in thirds instead of in halves. And where the difference of sex occurs in several generations, then the distribution is to be first made in that generation in which the difference of sex first appears. by awarding each male doubles he share of each female. Then the males are arranged in one class, and the females are arranged in another class. The shares inherited by the males is taken collectively, and that is distributed among their descendants by giving two parts to each male and one to each daughter: and the same thing is also done by distributing the collective shares of the females among their descendants according to

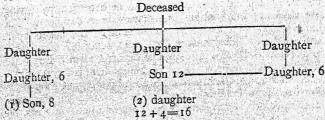
the same rule. This process is repeated until we get to the shares of the individual claimants. Thus—

		Deceased.		
Son S	on Son	Daughter	Daughter	Daughter
$\mathbf{p}$ 1	5 5	Š	- '\$	j P
, d ,	S D	ф ::	\$,	Ь

The property, in the above case, is first divided among the three sons and three daughters of the deceased, by giving two shares to each son, and one share to each daughter. inheritance taken collectively by the three sons is kept apart and is passed to their descendants, who being all daughters. there is no difference in distribution among them. But in the descendants of the three sons' daughters there is again difference of sex, and the inheritance taken by the three sons of the deceased is to be divided among the children of the sons' daughters, of whom one being a son and two daughters, the son has two shares, and each daughter one share. Thus, the two-thirds inherited by the three sons of the deceased are ultimately divided into four parts, two being taken by the son of a son's daughter, and one by each of the two son's daughters' daughters. Next, the inheritance taken by the three daughters of the deceased is taken collectively and distributed among their descendants in the second generation. These are two sons and one daughter. The one-third taken collectively by the three daughters of the deceased is divided into five shares. two for each daughter's son, and one for the daughter's daughter. These four shares taken by the two daughters' sons are kept apart and passed to their descendants in the third rank, and divided among them by giving the male two parts and the female one part. The share inherited by the daughter's daughter standing in the second rank, is passed unaltered to her daughter in the third rank.

The principle of the above method is to ascertain the shares of the males and females in the generation in which the difference of sex firs: occurs; then the males are separated from the females; then the portion of the males is distributed among their heirs, and that of the females is distributed among their heirs; and if there be a mixture of males and females among these, the shares of males of each group are taken a part from the shares of females of that group, and the process is repeated as shown above, until the distribution reaches to the individual claimants.

Fourthly: If a claimant is related to the deceased in two or more ways, he will get as many shares, whilst the claimant related in one way will inherit only one share, thus—



if a man had three daughters, one of whom left a daughter's son, and of the 1200 remaining daughters,—one had a son and the other a daughter, and this son married the daughter, and their issue is the daughter 2)—then, this last person is related to the deceased by 1200 ways. Then, according to Abu Yusuf, the daughter gets one share by her father's side, and one shire by her mother's side; and the son gets 1200 shares as a male; that is, the property is divided into 1200 parts, of which 1200 are taken by the son, and 1200 by the daughter. But according to Muhammad, the division is to be first made in the second generation, where the difference of sex first appears. Then, the share of the daughter's son is passed to the daughter's son's daughter, and the shares of the two daughters' daughters is again divided between the two claimants; so that, the female who is related in two ways inherits

from her father's as well as her mother's side. The property is first divided in the second generation into *ivenly-four* parts, of which *twelve* are given to the daughter's son, and *ivelve* to the two daughter's daughters. The son's share, *twelve* passes to his daughter (2), and the remainder *twelve* is divided between the two claimants in the proportion of two parts (8) to the male and one part (4) to the daughter. Therefore, the daughter (2) gets 12+4 or 16, and the son (1) gets 8.

266. DISTRIBUTION AMONG KINDRED OF THE OTHER CLASSES.—The rules laid down in the case of the first class also hold good in the case of the distribution among the distant kindred of the other three classes, with this difference that (1) in the SECOND CLASS of distant kindred, when the claimants are equal in degree, and they are all related through heirs, or all of them are not so related, but some of them be through the father's side and some through the mother's side, then the kindred on the father's side get two-thirds, and the kindred on the mother's side get one-third. And (2) in the FOURTH CLASS of distant kindred, when the sides of relation are equal, those who are related by father and mother are preferred to those who are related by the father only; and those who are related by the father are preferred to those who are related by the mother only: thus, if there be a paternal uncle and aunt both by the same mother, and there be a paternal uncle of the whole blood, then the latter will take the inheritance on account of his strength of consanguinity. But, when the sides are different, the strength of consanguinity will not prevail, but the paternal relations will get twice as much as the claimants by maternal relation, the former getting two-thirds and the latter one-third: as, when there be a paternal aunt of the whole blood, and a maternal aunt by the same mother only, then the former will get two-thirds, and the latter one-third, the father's kindred getting twice the share of the mother's kindred.

## Succession of the fœtus.

267. According to the Mahomedan Law, a child in the womb is entitled to inherit, and its share to the inheritance must be reserved.

268. If the child in the womb be, if born alive, a total excluder of the other heirs, then the whole estate must be reserved until the event of its birth. Thus, if the existing heirs are brothers or sisters or paternal uncles, of the deceased, and the child in the womb, if a son, would exclude them all, then there can be no distribution until its birth.

269. If the child in the womb would exclude some of the heirs and not the rest, then the shares of those who have no chance of being deprived may be paid, and the remainder of the estate is to be reserved until the birth of the child. Thus, if the existing beirs be a true-grandmother, and a brother of the deceased, then the grandmother, not being excluded by the child (whether a male or female), will be paid her one-sixth, and the remainder will be reserved.

270. If the child be a partial excluder of the other heirs, that is, if born alive it would reduce their shares to which they would otherwise be entitled, then they will be given the smaller of the two shares they are entitled to, and the remainder should be reserved. Thus, if there be the husband or the wife, whose shares are reduced by a child, then the husband or the wife will be given his or her smaller share (the share allotted when existing with the issue of the deceased), and the rest of the estate will be kept in abeyance.

271. If the heirs be of the description that are neither totally nor partially to be excluded by the child, but the child will simply be the participator of a share in the inheritance along with those heirs, then the share of one son will be reserved, and the rest will be distributed. Thus, if there be sons and daughters of the deceased, they will not be in any way excluded by the subsequent birth of a child, and the share of one son, which is the larger share for a child, will be reserved.

272. A child born dead is not entitled to inherit. But if it comes out dead on account of violence done to the mother, such as a kick in the belly, it will be counted as an heir.

273. If half the body of a child comes out while yet the child breathes, it will be taken as born alive, even if it dies before complete delivery. If the upper part (the head) comes out first, the appearance of the breast will be counted as half of the body having come out; but if the feet come out first, the appearance of the navel will be the limit.

## Missing Persons.

- 274. A person is said to be missing when it is not known where he is, or whether he is dead or alive.
- 275. A missing person is considered alive with regard to his own property, and dead with regard to the property of others, until such time has elapsed that it is inconceivable that he should be still alive. Until such time, his own property will not be distributed among his heirs; but a missing person does not inherit from a person who may have died in the meantime, hence it has been said that a missing person is considered as dead with regard to the property of others.
- 275. When a missing person has not been heard of, and go years have expired from the date of his birth, or when no one in the same village is alive, who was equal to him in age, he will be determined to be dead, and his property may be distributed among his heirs. His wife will also commence to observe the *iddat* after the expiration of the above period.
- 277. If a missing person returns alive, he shall take what was his right. But if judgment has already been given regarding his death, he will not be entitled to anything.
- 278. When several persons are killed together, and it is not know which of them died first tney are treated as having all died together. Their property is inherited by their respective heirs, but they cannot inherit from one another unless it is known who died first. He who died last will inherit from the one who died first.

### Vested Inheritance.

279. If a person dies leaving heirs, and then any of these heirs die before a partition of the inherited estate, and leave his own heirs, then the surviving heirs to the last deceased are said to having vested interests in the inheritance. Thus, a person dies leaving a son and a daughter. Next, the son dies, before partition, leaving his sister (the daughter of the first deceased) and a paternal uncle. Here, the estate of the first deceased was inherited by the son and the daughter, the former having two-thirds and the latter one-third. Of the two-thirds which fall in to the son's share, one-half (that is, a third of the whole) goes to the sister as her legal share, and the paternal uncle gets the remainder as residuary. The original estate is, therefore, ultimately divided in the following shares:—

The daughter gets one-third from her father.

"" " one-third from her brother.

Son's paternal uncle gets one-third from the son.

The daughter has, therefore, a vested inheritance in twothirds of the entire estate, and the son's paternal uncle in onethird of it.

# The Increase.

280. When the sum of the fractions that represent the shares of sharers is greater than an integer or whole number, the shares exceed the assets, and the case is called one of INCREASE. Thus, if the heirs are the husband, one full sister, and the mother,—the husband's share is a half, the full sister's share a half, and the mother is to get a thurd. But as the shares of the husband and the sister exhaust the whole property, nothing remains for the mother, and a device is adopted, which the lawyers call the Increase.

281. When by adding the fractions that represent the shares of the several heirs, the numerator is found to be in excess of the denominator, the case presents the application of the rule of Increase.

- **282.** The Rule: Raise the denominator of the sum of the fractions to the number expressed in the numerator. By this means, the deficiency is distributed over all the sharers in proportion to their respective shares. Thus, in the case of the husband, the full sister, and the mother, the shares are  $\frac{1}{3}$ ,  $\frac{1}{3}$ , and  $\frac{1}{3}$ ; the sum of the fractions is  $\frac{3}{6}$ ; the denominator 6 is increased to 8; the shares to be distributed are,  $\frac{3}{6}$ ,  $\frac{3}{6}$ , and  $\frac{2}{6}$ . The fractions representing the shares should all be reduced to equivalent fractions having a common denominator; then the denominator in these equivalent fractions shall be increased to the sum of their numerators. The new fractions thus formed will represent the shares which the heirs must get instead of their original legal shares.
- 283. The divisors two, three, four and eight—never increase, for in the cases in which they are required, the estate is either equal to or in excess of the shares, and consequently no increase is necessary.
- 284. The divisor 6 may be increased to 7, 8, 9, and 10. The divisor 12 may be increased to 13, 15, and 17. The divisor 24 may be increased to 27.
- 285. The increase of 6 and 12 to different numbers, is required to meet different cases. Thus, a person leaves a true grandmother, one full sister, two half sisters by the mother, and one half sister by the father. The shares of these heirs are  $\frac{1}{6}$ ,  $\frac{1}{3}$ ,  $\frac{1}{6}$ , respectively. Reducing to a common denominator, the fractions are  $\frac{1}{6}$ ,  $\frac{3}{6}$ ,  $\frac{2}{6}$ , and  $\frac{1}{6}$ ; the sum of the numerators in these new fractions is 7, hence the divisor 6 is increased to 7, and the shares are  $\frac{1}{7}$ ,  $\frac{3}{7}$ ,  $\frac{2}{7}$ , and  $\frac{1}{7}$  respectively. The increase of 6 to 8 has been shown above. The divisor 6 is increased to 9 in the case where there are a husband, a mother, a full sister, a half sister by the father, and a half sister by the mother.
- 283. A man left a wife, two daughters, and both parents. In this case, which is known as the case of the *memberyya* decided by Ali when he was on the pulpit, the divisor 24 is raised to 27.

287. According to Ibn Masnud, the divisor 24 may be raised to 31, in the case in which a man leaves a wife, his mother, two sisters by same father and mother, two sister by the same mother, and a son rendered incapable of inheriting. Here, the son though himself excluded from the inheritance on account of his incapacity, will reduce the share of the wife to an eighth and of the mother to a sixth. The shares of the heirs (except, the son who does not inherit) are  $\frac{1}{8}$ ,  $\frac{1}{8}$ ,  $\frac{3}{8}$ , and  $\frac{1}{6}$  respectively. Reducing to L. C. M., they are  $\frac{3}{84}$ ,  $\frac{8}{24}$ ,  $\frac{1}{26}$ , and  $\frac{4}{48}$ , and the sum of their numerators being 31, the divisor 24 is raised to 31.

### The Return.

- 288. The RETURN is the converse of the Increase. It takes place when there is a surplus after the sharers have taken their legal shares, and there is no residuary to take the surplus. In such case, the surplus reverts to the *sharers* in proportion to their shares, with the exception of the husband and wife.
- 289. The persons entitled to take in the Return are the following:—the mother, the grandmother, the daughter, the son's daughter, the full sister, the half sisters whether by the father's side or the mother's side, the half brother by the mother. The father and the paternal grandfather would take as residuaries, and consequently no return is made to them.
- 290. The husband and the wife are not entitled to share in the return when there is a single heir by consanguinity. When there are ro such heirs, the husband, or the wife, as the case may be, would first take his or her legal share, and then the surplus would revert to him or her by return.
- 291. Exampels.—(1) If there be a grandmother and one half sister by the mother. The share taken by each is a sixth and the residue reverts to them in equal proportion (their shares being equal), so that they ultimately divide the property in halves.

- (2) If there be a daughter and a mother. The daughter takes a half and the mother a sixth, as shares, that is, the daughter's share is three times as much as the mother's share, and the return of the residue will be made in the same proportion. So, the entire estate is divided into four shares, of which three are given to the daughter, and one to the mother.
- (3) If there be a sharer who cannot participate in the Return, and only one class of sharers who are entitled to the Return, as, when there are three daughters and the husband. The husband's one-fourth is first given to him, and the residue is equally divided between the daughters.
- (4) If there is a sharer who cannot participate in the Return, and two or more classes of sharers who are entitled to the Return. The legal share of the one not entitled to the Return is first given out, and then the residue is divided among the heirs who are entitled to the Return, in proportion to their respective rights. Thus, if there be a wife, a true-grandmother, and two half sisters by the mother. The wife, not being entitled to the Return, is paid her share—one-fourth; the residue (three shares) is divided between the grandmother and the half sisters in the proportion of 2 parts to the latter, and one to the former. Therefore, the wife gets 1 share; the grandmother, 1 share; and the two half sisters 2 shares. The estate was here divided into 4 equal shares.

### Exclusion.

292. Exclusion from inheritance is of two kinds—total and partial. Total exclusion means the entire privation of the heritable rights of an heir on account of the preference given to a nearer claimant. By partial or imperfect exclusion is meant that the heir is excluded from a larger share, and is admitted to a smaller share. A son's child is totally excluded by a son; brothers and sisters are excluded by a son or son's son, by the father, and also by the grandfather. The grandfather is totally excluded by the father.

- 298. There are six heirs who are never totally excluded. These are—the father, the son, the husband, the mother, the daughter, and the wife. As regards all other heirs, (1) the nearer excludes the more remote; and, (2) a person who is related to the deceased through another is not entitled to inherit while that other lives, with the exception of the mother's children who inherit with the mother.
- 294. Examples of the nearer relatives excluding the more remale:—(1) the exclusion of brothers and sisters by the persons enumerated above; (2) the exclusion of paternal half brothers and sisters, by the full brothers and sisters, and also by the above; (3) exclusion of all grandmothers by the mother; (4) the exclusion of all remoter grandmothers by the nearer grandmother.
- 295. Exclusion of one who claims through another, while the latter is alive:—(1) the son's children are all excluded by the son; (2) the exclusion of the father's mother (how high soever) by the father; (3) the exclusion of the mother's mother (how high sover) by the mother; (4) the grandfathers excluded by the father. There is one exception to this rule, namely, that the half brothers and sisters on the mother's side, are not excluded by the mother through whom they are related to the deceased.
- 296. Imperfect or partial exclusion, that is, an exclusion from one share and admission to a smaller one, takes place in respect of *five* persons—the husband, the wife, the mother, the son's daughter, the sister by the same father. Thus, when there is no issue of the deceased, the husband would get a half, but he gets a fourth only when there is a child of the deceased. The partial exclusion of the others has been pointed out whilst discussing their inheritance.
- 297. A person who is himself excluded by another, would nevertheless exclude others. Thus, if there be the father, the father's mother, and the mother's mother's mother with father's mother is herself excluded by the father, and yet she excludes the mother's grandmother. Similarly, if there be two or more brothers or sisters, and they are themselves exclude.

ed by the father, yet they would drive the mother from a third to a sixth of the inheritance.

- 298. Impediments to inheritance are four, and they are—
  (1) Slavery: (2) Homicide: (3) Difference of religion: (4)
  Difference of country.
- 299. Slavery, whether absolute or qualified is an impediment. Even a partially emancipated slave would not inhe-Homicide means, here, the unlawful (intentional or accidental) killing of another. The killer is incapable of inheriting to the person he has killed. But when a man is the indirect cause of another's death, he does not forfeit the right. By difference of religion is meant the difference between Islam and infidelity. By Act XXI. of 1850, the disqualification of an apostate to inherit from another has been removed. "So much of any law or usage as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law." But though the apostate's cwn disqualification has been removed, yet his children, if they are also apostates, are still under the disqualification. Difference of country that is, a difference of armies and government) is not an impediment to succession when the parties are Mussulmans. It applies to unbelievers only.
- 300. A person incapable of inheriting on account of an impediment, such as, slavery or homicide, does not exclude any one. [But, according to Ibn Masnud, such a person excludes imperfectly. Thus, in the case of the Increase in s. 287 of this book, the son though incapable of inheriting himself, reduces the wife's share to an eighth; otherwise, we do not get the number 31, the sum of the shares. But, according to the Strafinga, which is the highest authority on the law of inheritance among the Sunnis, such a person does not exclude others].

Shift for the fire

## Shea School.

301. According to the Shea School, title to succession is founded upon three different causes: First, nasab or consanguinity: that is, the connection of one person with another by the ties of blood or descent by birth. Second, Sabab or affinity, that is, the connection of one person with another produced by marriage. Third, Wula or deminion, that is, the connection, of one person with another by emancipation, or religious leadership, or by responsibility for offence.

302. Heirs are divided into three classes. Those who have appointed shares in the deceased's estate; such as, the mother. Those who sometimes get appointed shares, and sometimes as residuaries, such as, the daughter, Those who inherit exclusively as residuaries; as, the son.

303. Those who inherit by right of consanguinity are divided into three distinct classes. In the first class are included (1) the deceased's immediate parents, that is, his father and mother (without extending to more remote ancestors), and (2) his children, how low soever. The father and mother always inherit with the children of the deceased, however remote in descent; but among children, the nearer always excludes the more remote. Thus, a man's father and mother will not exclude his great-great-grandchild nor his son or grandson will exclude the parents, but his son will exclude the grandson and all below him, the grandson will exclude the great-grandson and all descendants below him.

304. The second class of consanguineous heirs are likewise of two sorts:—(1) the grandfathers and grandmothers, how high soever, and (2) brothers and sisters, and their children, how low soever in descent. Here also, the brothers and sisters, and their children, however low in descent, do not exclude, nor are excluded by, any member of the first sort—the grandfathers and grandmothers, however high they may be. But, among the grandfathers and grandmothers, the nearer always excludes the more remote, as the father's father excludes the father's grandfather; and among brothers and sisters and their children, the nearer will always exclude the

more remote—thus, a brother's son will not inherit when there is a brother or sister, nor a brother's grandson will inherit so long as there is a brother's or sister's son.

- 305. Under the third class of consanguineous heirs, are included brothers and sisters of the father and mother, that is. the paternal and maternal uncles and aunts, and their children and children's children. But the nearest of these in descent always excludes one who is more remote. Thus, the son of a paternal uncle does not inherit so long as there is a paternal uncle or aunt; and the son of a maternal uncle does not inherit so long as there is a maternal uncle or aunt. And, so long as there is a paternal uncle or aunt, or a maternal uncle or aunt, the children of the paternal or maternal uncle or aunt will have no right in the inheritance. There is one exception to this rule, namely, a full paternal uncle's son excludes a paternal half-uncle, that is, a father's full brother's son excludes the father's half brother. In this class, among relatives of the same side, the male has the share of two females; but when the sides differ, as when there are both paternal aunts and maternal aunts, the relatives by the father's side have two-thirds and those by the mother's side have one-third.
  - 306. Of the three classes of consanguineous heirs, the first class succeeds first in preference to the second and third. So long as there remains a single member of the first class, no member of the other two classes will have any right to the inheritance. And, so long as there is a member of the second class, none of the third class will inherit. It will be seen hereafter, that the husband or wife always inherits with any of these classes, and is never excluded.
  - 807. On failure of the third class of consanguineous heirs, the succession devolves upon the paternal and maternal grand uncles and grand-aunts, that is, the paternal and maternal uncles and aunts of the father and mother, and their children, how low soever; failing them, the succession goes to the paternal and maternal uncles and aunts of the deceased's grandfather and grandmother, and to their children, how low soever; and then the succession goes to the next higher generation in the same order as described before.

- 308. The heirs who inherit by reason of affinity are the husband and the wife, and they are never excluded, being always entitled to innerit with any class of heirs. The husband gets his legal share, and also inherits as a residuary, on failure of other heirs, and with the Imam. But the wife never gets any residuary portion, by way of return. She gets her appointed share only.
- 309. A temporary marriage, or a contract of moota, does not establish a title to succession in either of the parties.
- 31.0. The succession of the heirs described above is regulated by the following rules:—
- (1) The sharers and their shares as described before, are also the same in this school;
- (2) If there be a male and a female of equal grade and on the same side of relationship, the male has double the share of the female;
- (3) A relation of the whole blood entirely excludes a relation of the father's side, if both of them are of the same degree. Thus, a brother or a sister of the whole blood will exclude brothers and sisters by the same father. But a son of a brother by the same father and mother does not exclude a brother or siser by the same father, for here the degrees are different, and the latter are nearer in degree of propinquity. A son of the whole brother will, however, exclude a son of a half brother by the same father. This principle is also applicable in the case of paternal and maternal uncles and aunts and their children, and to all the heirs that are enumerated in classes third and fourth, with two exceptions;—(1) the full paternal uncle's on excludes the father's half brother (who is a half uncle by the father's side), and (2) the exclusion of half relations by whole relations of the same degree, is not applicable when the sides of relationship are different; thus, a paternal full uncle does not exclude the mother's half brother by the same tather (or the maternal half uncle). If a person leave a paternal half-uncle, and a maternal full aunt, no exclusion can take place, because the sides of relationship are different.

- (4) In any class of heirs, the nearer always excludes the more remote, if they are both of the same sort. [This has been exemplified whilst classifying the heirs.]
- (5) When some of the relations are by the father's side, and some by the mother's side as, when there are paternal uncles and maternal aunts), the paternal relations have two-thirds for their share, and the maternal relations (of the same grade) will get only one-third.
- (6) When there are both whole relations and persons related to the deceased by the mother, the latter will get their appointed shares, but will not be entitled to any share in the residue by way of return. Thus, if there be a sister by the same father and mother, and a sister by the same mother, the former gets a half as her legal share, and the latter a sixth, the residue one-third being taken entirely by the whole sister.
- (7) A person having two relations, does not exclude one having ine relation; but the person with a double relation gets a two-fold portion in the inheritance; provided, they are both in the same degree of propinquity. Thus, if there be a paternal uncle, who is also an uncle by the mother's side, and there be a maternal uncle, the paternal uncle is, first, entitled to double the share of the maternal uncle by rule (5), thus, he takes two-thirds and the maternal uncle takes one-third; again the paternal uncle, by virtue of his being an uncle by the mother's side, is allowed to have an equal share in the maternal uncle's portion, and he thus takes away a sixth, making up five-sixths in the end, while the pure maternal uncle's share remains one-sixth.
- 311. Failing all heirs, by consanguinity and affinity, the succession devolves upon the manumitter of a slave; then upon one "who undertakes by contract with a person who has no heirs by blood or manumission, the responsibility for all crimes and offences to be by him committed through error or inadvertency, and thereby requiring explation by fine." Failing these, again, the entire property vests in the *Imam*. It should be remembered here, that a person leaving no other heir except

his widow, the widow would be entitled to her *one-fourth* share and no more, and the residue would pass to the successors by, we will a described here.

# ACT IX. OF 1875.

# The Indian Majority Act, 1875.\*

RECEIVED THE G.-G.'S ASSENT ON THE 2ND MARCH 1875.

An Act to amend the Law respecting the Age of Majorily.

Whereas, in the case of persons domiciled in British India, it is expedient to prolong the period of nonage, and to attain more uniformity and certainty respecting the age of majority, than now exists; It is hereby enacted as follows:

Short title.

1. This Act may be called "The Indian Majority Act, 1875:"

\* For the Statement of Objects and Reasons, see Gasette of India, 1874, Pt. V., p. 153; for Proceedings in Council, see ibid, Supplement, p. 668, and Extra Supplement dated 12th May 1874, p. 4, and ibid, 1875, Supplement, p. 333.

Supplement, p. 333.

This Act has been declared, by notification under s. 3 (a) of the Scheduled Districts Act (XIV. of 1874), to be in force in the following

Scheduled Districts, namely :-

(1) The Districts of Hazaribagh, Lohardaga, and Manbhum, and Pargana Dhalbhum, and the Kolhan in the District of Singhbhum. [The Lohardaga District included at this time the present District of Palamau, which was separated in 1894].—See Gasette of India. 1881, Pt. I., p. 504:

(2) The North-Western Provinces Tarai.—See Gasette of India, 1876, Pt. I., p. 505.

It has been extended, by notification under s. 5 of the same Act, to British Baluchistan.—See Gazette of India, 1897, Pt. II., p. 60.

It has been declared in force in-

- (1) Upper Burma (except the Shan States) by Act XIII. of 1898,
- (2) the Arakan Hill District by the Arakan Hill District Laws Regulation (IX. of 1874), s. 3, as amended by Act XIII. of 1898, s. 16.

It has been applied to the Baluchistan Agency Territories.—See Gazette of India, 1897, Pt. I., p. 27.

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Act IX., 1875.—1.

lt extends to the whole of British India, and, so far as regards subjects of her Majesty, to the dominions of Princes and States in India in alliance with Her Majesty;

and it shall come into force and have effect only on the ex-Commencement and operation.

Commencement and operapiration of three months from the passing thereof.

2. Nothing herein contained shall

Savings.

(a) the capacity of any person to act in the following matters (namely)—marriage, dower, divorce, and adoption;

- (b) the religion or religions, rites and usages of any class of Her Majesty's subjects in India; or
- (c) the capacity of any person who, before this Act comes into force, has attained majority under the law applicable to him.

Note.—According to the Mahomedan law, a person becomes an adult on the expiration of his or her fifteenth year, unless symptoms of puberty appear at an earlier age. Among the Hindus minority terminates at the age of sixteen.

3. Subject as aforesaid, "every minor of whose person or Age of majority of persons property, or both, a guardian, other domiciled in British India. than a guardian for a suit within the meaning of Chapter XXXI.\* of the Code of Civil Procedure, has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of eighteen years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age,"† shall, notwithstanding anything contained in the Indian Succession Act (No. X. of 1865), or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years, and not before.

\* This reference to Ch. XXXI. of the old Civil Procedure Code should now mean to apply to Order XXXII of Act V. of 1908

<sup>†</sup> The words quoted have been substituted for the words, "every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards," by the Guardians and Wards Act (VIII. of 1890), s. 52.

Subject, as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years, and not before.

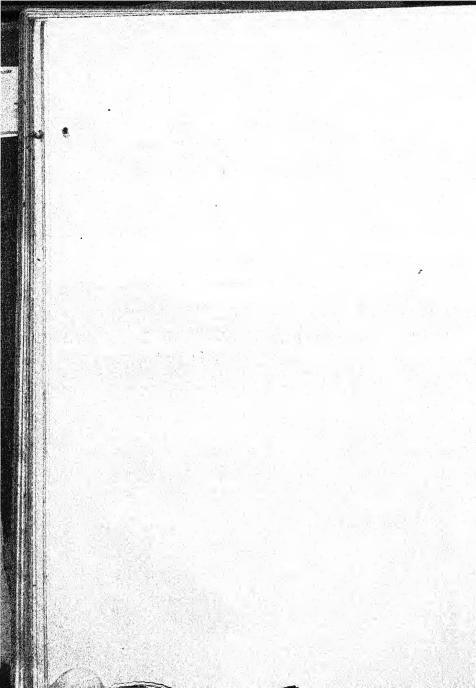
4. In computing the age of any person, the day on which he Age of majority how comwas born is to be included as a whole day, and he shall be deemed to have attained majority, if he falls within the first paragraph of section 3, at the beginning of the twenty-first anniversary of that day, and if he falls within the second paragraph of section 3, at the beginning of the eighteenth anniversary of that day.

#### Illustrations.

(a.) Z is born in British India on the first day of January 1850, and has a British Indian domicile. A guardian of his person is appointed by a Court of Justice: Z attains majority at the first moment of the first day of January 1871.

(b.) Z is born in British India on the twenty-ninth day of February 1852, and has a British Indian domicile. A guardian of his property is appointed by a Court of Justice: Z attains majority at the first moment of the twenty-eighth day of February 1873.

(c.) Z is born on the first day of January 1850. He acquires a domicile in British Iedia. No guardian is appointed of his person or property by any Court of Justice, nor is he under the jurisdiction of any Court of Wards: Z attains majority at the first moment of the first day of January 1868.



# ACT NO. IV. OF 1882.

# The Transfer of Property Act, 1882.

[As amended by Act V. of 1908.]
CONTENTS.

PREAMBLE.

#### CHAPTER I.

#### PRELIMINARY.

#### SECTIONS.

- Short title. Commencement. Extent.
- Repeal of Acts.
   Saving of certain enactments, incidents, rights, liabilities,
- 3. Interpretation-clause—
  "immoveable property:"
  - "instrument:"
  - "registered:"
    "attached to the earth:"
  - "actionable claim : "
  - " notice."
- Enactments relating to contracts to be taken as part of Act IX. of 1872.

### CHAPTER II.

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

- (A.)—Transfer of Property, whether Moveable or Immoveable.
  - 5. "Transfer of property" de-
  - 6. What may be transferred.
  - 7. Persons competent to transfer.
  - 8. Operation of transfer.
  - 9. Oral transfer.

5,090.-24-5-1915.

#### SECTIONS.

- Condition restraining alienation.
- 11. Restriction repugnant to interest created.
- Condition making interest determinable on insolvency or attempted alienation.
- Transfer for benefit of unborn person.
- 14. Rule against perpetuity.
- 15. Transfer to class, some of whom come under sections 13 and 14.
- 16. Transfer to take effect on failure of prior transfer.
- 17. Transfer in perpetuity for benefit of public.
- 18. Direction for accumulation.
- 10. Vested interest.
- 20. When unborn person acquires vested interest on transfer for his benefit.
- 21. Contingent interest.
- 22. Transfer to members of a class who attain a particular age.
- 23. Transfer contingent on happening of specified uncertain event.
- 24. Transfer to such of certain persons as survive at some period not specified.
- 25. Conditional transfer
- 26. Fulfilment of condition precedent.
- 27 Conditional transfer to one person coupled with transferto another on failure of prior disposition.

Ac IV. 1882 .- 1.

28. Ulterior transfer conditional on happening or not happening of specified event.

29. Fulfilment of condition subse-

quent.

30. Prior disposition not affected by invalidity of ulterior disposition.

31. Condition that transfer shall cease to have effect in case uncertain specified happens or does not happen.

32. Such condition must not be

invalid.

33. Transfer conditional on performance of act, no time being specified for performance.

34. Transfer conditional on performance of act, time being

specified.

#### Election.

35. Election when necessary.

## Apportionment.

periodical 36. Apportionment of payments on determination of interest of person entitled

37. Apportionment of benefit of obligation on severance.

## (B.)-Transfer of Immoveable Property.

38. Transfer by person authorized only under certain circumstances to transfer.

39. Transfer where third person is entitled to maintenance

40. Burden of obligation imposing restriction on use of land or of obligation annexed to ownership, but not amounting to interest easement.

41. Transfer by ostensible owner.

#### SECTIONS.

by person having 42. Transfer authority to revoke former transfer.

43. Transfer by unauthorized person who subsequently acquires interest in property

transferred.

44. Transfer by one co-owner.

45. Joint transfer for consideration.

46. Transfer for consideration by person having distinct interests.

47. Transfer by co-owners of share in common property.

48. Priority of rights created by transfer.

49. Transferee's right under policy.

50. Rent bona fide paid to holder under defective title.

51. Improvements made by bonafide holders under defective

52. Transfer of property pending suit relating thereto.

53. Fraudulent transfer.

### CHAPTER III.

# OF SALES OF IMMOVEABLE

### PROPERTY.

54. "Sale" defined. Sale how made. Contract for sale.

55. Rights and liabilities of buyer

and seller.

56. Sale of one of two properties subject to a common charge.

### Discharge of Incumbrances on Sale.

57. Provision by Court for incumbrances, and sale freed therefrom.

#### CHAPTER IV.

- OF MORTGAGES OF IMMOVEABLE PROPERTY AND CHARGES.
- 58. Mortgage." "mortgagor,"
  "mortgagee," "mortgagemoney,"and "mortgage-deed"
  defined.
  Simple mortgage.
  Mortgage by conditional sale.
  Usufructuary mortgage.

59. "Mortgage when to be by assurance.

English mortgage.

# Rights and Liabilities of Mortgagor.

- 60. Right of mortgagor to redeem.
   Redemption of portion of mort-
- gaged property.

  51. Right to redeem one of two properties separately mortgaged.
- 62. Right of usufructuary mortgagor to recover possession.
- 63. Accession to mortgaged property.
  - Accession acquired in virtue of transferred ownership.
- 64. Renewal of mortgaged lease.55. Implied contracts by mortgagor.
- 66. Waste by mortgagor in possession.

# Rights and Liabilities of Mortgagee.

- 67. Right to foreclosure or sale.
- 68. Right to sue for mortgagemoney.
- 69. Power of sale when valid.
- 70. Accession to mortgaged property.
- 71. Renewal of mortgaged lease.
- 72. Rights of mortgagee in pos-

### SECTIONS.

- 73. Charge on proceeds of revenuesale.
- 74. Right of subsequent morts gagee to pay off prior mort-gagee.
- Rights of mesne mortgagee against prior and subsequent mortgagees.
- 76. Liabilities of mortgagee in possession.
- Loss occasioned by his default.
  77. Receipts in lieu of interest.

### Priority.

- Postponement of prior mortgagee.
- Mortgage to secure uncertain amount when maximum is expressed.
- 80. Tacking abolished.
- Marshalling and Contribution.
- 81. Marshalling securities.
- 82. Contribution to mortgage-

# Deposit in Court.

- 83. Power to deposit in Court money due on mortgage.
  Right to money deposited by mortgagor.
- 84. Cessation of interest. 85-90. [Repealed by Act V. o

1908.7

### Redemption.

- 91. Who may sue for redemption. 92 to 94. [Repealed Act V. of 1908.]
- 95. Charge of one of several comortgagors who redeems.
- 96, 97. [ Repealed by Act V. of 1908.]

# Anomalous Mortgages.

- 98. Mortgage not described in section 58, clauses (b), (c), (d), and (e).
- 99. [ Repealed by Act V. of 1908.] Charges.

100. Charges.

101. Extinguishment of charges.

## Notice and Tender.

302. Service or tender on or to agent.

103. Notice, &c., to or by person incompetent to contract.

104. Power to make rules.

### CHAPTER V.

# OF LEASES OF IMMOVEABLE

### PROPERTY.

105. "Lease" defined.

"Lessor," "lessee," "premium," and "rent" defined.

106. Duration of certain leases in absence of written contract or local usage.

107. Leases how made.

108. Rights and liabilities of lessor and lessee.

### A .- Rights and Liabilities of the Lessor.

### B .- Rights and Liabilities of the Lessee.

100. Rights of lessor's transferee. 110. Exclusion of day on which term commences.

Duration of lease for a year. Option to determine lease.

111. Determination of lease. 112. Waiver of forfeiture.

113. Waiver of notice to quit.

#### SECTIONS.

114. Relief against forfeiture for non-payment of rent.

115. Effect of surrender and forfeiture on under-leases.

116. Effect of holding over.

117. Exemption of leases for agricultural purposes.

# CHAPTER VI.

### OF EXCHANGES.

118. " Exchange" defined.

119. Right of party deprived of thing received in exchange.

120. Rights and liabilities of parties.

121. Exchange of money.

## CHAPTER VII.

### OF GIFTS.

122. "Gift" defined.

Acceptance when to be made.

123. Transfer how effected.

124. Gift of existing and future property. 125. Gift to several of whom one

does not accept.

126. When gift may be suspended or revoked.

127. Onerous gifts. Onerous gift to disqualified person.

128. Universal donee.

129. Saving of donations mortis causa and Muhammadan law.

## CHAPTER VIII.

- OF TRANSFERS OF ACTIONABLE CLAIMS.
- 130. Transfer of actionable claim.

- 131. Notice to be in writing signed.
- 332. Liability of transferee of actionable claim.
- 133. Warranty of solvency of debtor.
- 134. Mortgaged debt.
- I35. Assignment of rights under marine or fire policy of insurance.

### SECTIONS.

- 136. Incapacity of officers connected with Courts of Justice.
- 137. Saving of negotiable instruments, &c.

THE SCHEDULE:

ENACTMENTS REPEALED.

# ACT NO. IV. OF 1882:\*

The Transfer of Property Act, 1882.

RECEIVED THE G.-G.'S ASSENT ON THE 17TH FEBRUARY 1882.

An act to amend the Law relating to the Transfer of Property by Act of Parties.

WHEREAS it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties; It is hereby enacted as follows:—

# CHAPTER I.

### PRELIMINARY.

Short title.

1. This Act may be called the "Transfer of Property Act, 1882:"

Commencement.

It shall come into force on the first day of July 1882:

It extends, in the first instance, to the whole of British India except the territories respectively administered by the Governor of Bombay

<sup>\*</sup> For Statement of Objects and Reasons, see Gasette of India, 1887, Pt. V., p. 171; for the Preliminary Report of the Select Committee, see ibid., 1878, Pt. V., p. 48; for the further Report of the Select Commitsee ibid., 1879, Pt. V., p. 106; for the Third Report of the Select Commitsee ibid., 1887, Pt. V., p. 395; for Proceedings in Council, see ibid., tee, see ibid., 1881, Pt. V., p. 395; for Proceedings in Council, see ibid., 1877, Supplement, p. 1690; ibid., 1882, Supplement, p. 1690; ibid., 1882, Supplement, p. 66; ibid., 1882, Supplement, p. 169.

The Transfer of Property Act (IV. of 1882) does not apply to Crown Grants.—See the Crown Grants Act (XV. of 1895), printed at p. 78, infra.

Act IV. of 1882 has ceased to be in force in the Naga Hills District (including the Mokokchang Sub-division), the Dibrugarh Frontier Tract, the North Cachar Hills, the Garo Hills, the Khasia and Jaintia Hills, and the Mikir Hills Tract.—See Assam Rules Manual, Ed. 1893, pp. 408, 409, 884, Pt. II., pp. 212 and 705 respectively.

in Council, the Lieutenant-Governor of the Punjab, and the Chief Commissioner of British Burma.\*

But any of the said Local Governments may, from time to time, by notification in the local official Gazette, extend† this Act "or any part thereof" ‡ to the whole of any specified part of the territories under its administration.

"And any Local Government may, with the previous sanction of the Governor-General in Council, from time to time, by notification in the local official Gazette, exempt, either retrospectively or prospectively, any part of the territories administered by such Local Government from all or any of the following provisions, namely:—

"Section 54, paragraphs 2 and 3, 59, 107, and 123."

Notwithstanding anything in the foregoing part of this sections sections 54, paragraphs 2 and 3, 59, 107, and 123 shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act, 1877, under the power conferred by the first section of that Act or otherwise.\*\*

<sup>\*</sup> This reference to British Burma should now be read as referring to Lower Burma.—See the Upper Burma Laws Act (XX. of 1886), s. 4, and now the Burma Laws Act (XIII. of 1893), by which, Act XX. of 1886 has been repealed. The Chief Commissioner is now Lieutenant-Governor of Burma—See Proclamation, dated 9th April 1897, in Gazette of India, 1897, Pt. I., p. 261.

<sup>†</sup> Act IV. of 1832 has, from the 1st January 1893, been extended to—
(1) the whole of the territories (other than the Scheduled Districts)
under the administration of the Government of Bombay (see

Bombay Government Gasette, 1892, Pt. I., p. 1071); and (2) the area included within the local limits of the ordinary civil jurisdiction of the Recorder of Rangoon (see Burma Gazette, 1892, Pt. 1., p. 373).

The words quoted have been inserted by Act VI. of 1904.

No such exemption has yet been made.

The two clauses quoted have been substituted for the original clause by the Transfer of Property Act (1882) Amendment Act (III. of 1885), s. 1.

S. 54, paras. 2 and 3, and ss. 59, 107, and 123 of the Transfer of Property Act. 1882, with respect to the transfer of property by registered instrument, shall, on and from the commencement of the Cantonments Act (XIII. of 1889) extend to every cantonment in British India.——See the Cantonments Act (XIII. of 1889), s. 32 (1).

<sup>¶</sup> Act III. of 1877.

\*\*\* This clause has been added by Act III. of 1885, s. 2, and is to be deemed to have been added from the date on which Act IV. of 1882 came into force.

2. In the territories to which this Act extends for the time being, the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect—

Saving of certain enactments, incidents, rights, lianot hereby expressly repealed; bilities, &c.

- (b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force;
- (c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability; or
- (d) save as provided by section 57 and Chapter IV. of this Act, any transfer by operation of law, or by, or in execution of, a decree or order of a Court of competent jurisdiction; and nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan, or Buddhist law.

3. In this Act, unless there is something repugnant in the subject or context—

"immoveable property" does not include standing timber, growing crops, or grass:

"instrument:" means a non-testamentary instrument:

"registered" means registered in British India under the law\*
for the time being in force regulating the
registered:"
registered:

"attached to the earth:" "attached to the earth" means-

- (a) rooted in the earth, as in the case of trees and shrubs:
- (δ) imbedded in the earth, as in the case of walls or buildings; or
- (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached:

<sup>\*</sup> See the Indian Registration Act (III. of 1877).

"'actionable claim' means a claim to any debt, other than a
debt secured by mortgage of immoveable
property, or by hypothecation or pledge
of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the
claimant, which the Civil Courts recognize as affording grounds
for relief, whether such debt or beneficial interest be existent, accruing, conditional, or contingent:"\*

and a person is said to have "notice" of a fact when he actually knows that fact, or when, but for
wilful abstention from an inquiry or
search which he ought to have made, or gross negligence, he would
have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian
Contract Act, 1872,† s. 229.

Enactments relating to contracts to be taken as part of Act IX. of 1872.

4. The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872.†

‡ And sections 54, paragraphs 2 and 3, 59, 107, and 123 shall be read as supplemental to the Indian Registration Act, 1877.§

# CHAPTER II.

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

(A.) - Transfer of Property, whether Moveable or Immoveable.

5. In the following sections "transfer of property" means "Transfer of property" an act by which a living person conveys defined. property, in present or in future, to one or more other living persons, or to himself and one or more other living persons, and "to transfer property" is to perform such act.

<sup>\*</sup> This definition of "actionable claim" has been inserted by the Transfer of Property Act (II. of 1900), s. 2.

<sup>†</sup> Act IX. of 1872.

<sup>†</sup> This paragraph has been added by the Transfer of Property Act (1882) Amendment Act (III. of 1885), s. 3.

<sup>§</sup> See the Indian Registration Act (III. of 1877).

Nothing in Ch. II. is to be deemed to affect any rule of Hindu Muhammadan, or Buddhist law.—See s. 2, supra.

- 6. Property of any kind may be transferred except as otherwise provided by this Act, or by any other law for the time being in force.
- (a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.
- (b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.
- (c) An easement cannot be transferred apart from the dominant heritage.
- (d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.
  - (e) A mere right to sue\* cannot be transferred.
- (f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.
- (g) Stipends allowed to military and civil pensioners of Government and political pensions cannot be transferred.
- (h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872,† or (3) to a person legally disqualified to be transferee.
- (i) Nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer, or lessee.
- 7. Every person competent to contract, and entitled to trans-Persons competent to ferable property, or authorized to distransfer. pose of transferable property not his

In cl. (e), the words, "for compensation for a fraud or for harm illegally caused," repealed by the Transfer of Property Act (II of 1900), S. 3 (i), have here been omitted.

<sup>†</sup> In cl. (h), the italicized words have been substituted for the words, "for an illegal purpose," by the Transfer of Property Act (II. of 1900), s. 3 (ii).

<sup>‡</sup> cl. (i) has been added by the Transfer of Property Act (1882) Amendment Act (III. of 1885), s. 4.

own, is competent to transfer such property, either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent, and in the manner, allowed and prescribed by any law for the time being in force.

8. Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;

and where the property is machinery attached to the earth, the moveable parts thereof;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith;

and where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

- Oral transfer of property may be made without writing in every case in which a writing is not expressly required by law.
- Condition restraining all-limitation, absolutely restraining the transferee or any person claiming under him from parting with, or disposing of, his interest in the property, the condition or limitation is void except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan, or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

Restriction repugnant to created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immoveable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner.

Condition making interest determinable on insolvency or attempted alienation.

Condition making interest limitation, making any interest therein reserved or given to or for the benefit of any person to cease on his becoming insolvent, or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

18. Where, on a transfer of property, an interest therein is

Transfer for benefit of uncertainty created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect unless it extends to the whole of the remaining interest of the transferor in the property.

# Illustration.

A transfers property, of which he is the owner, to B, in trust for A and his intended wife successively for their lives, and after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

14. No transfer of property can operate to create an interest which is to take effect after the lifetime Rule against perpetuity. Of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom if he attains full age, the interest created is to belong.

- Transfer to class, some of whom come under sections 13 and 14.

  Transfer to class, some of with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails as regards the whole class.
- 16. Where an interest fails by reason of any of the rules

  Transfer to take effect on contained in sections 13, 14, and 15, failure of prior transfer. any interest created in the same transaction, and intended to take effect after or upon failure of such prior interest, also fails.
- 17. The restrictions in sections 14, 15, and 16 shall not apply
  Transfer in perpetuity for to property transferred for the benefit benefit of public. of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.
- 18. Where the terms of a transfer of property direct that the income arising from the property shall be accumulated, such direction shall be void, and the property shall be disposed of as if no accumulation had been directed.

Exception.—Where the property is immoveable, or where accumulation is directed to be made from the date of the transfer, the direction snall be valid in respect only of the income arising from the property within one year next following such date; and, at the end of the year, such property and income shall be disposed of respectively as it the period during which the accumulation has been directed to be made had elapsed.

19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith, or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoy-

ment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that, if a particular event shall happen, the interest shall pass to another person.

- 20. Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, When unborn person acquires vested interest on unless a contrary intention appear from transfer for his benefit. the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.
- 21. Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a spe-Contingent interest. cified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest in the former case, on the happening of the event; in the latter, when the happening of the event becomes impossible.

Exception.-Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to nim absolutely the income to arise from such interest before he reaches that age, or directs the income, or so much thereof as may be necessary, to be applied for his benefit, such interest is not contingent.

- 22. Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a parti-Transfer to members of a class who attain a particular cular age, such interest does not vest in any member of the class who has not attained that age.
- 23. Waere, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen Transfer contingent on happening of specified uncertain and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

24. Where, on a transfer of property, an interest therein is

Transfer to such of certain
persons as survive at some
period not specified.

the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate
or precedent interest ceases to exist unless a contrary intention
appears from the terms of the transfer.

#### Illustration.

A transfers property to B for life, and after his death to C and D equally to be divided between them, or to the survivor of them. C dies during the life of B. D survives B. At B's death the property passes to D.

25. An interest created on a transfer of property, and de-Conditional transfer. pendent upon a condition, fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

#### Illustrations.

- (a.) A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void.
- (b.) A gives Rs. 500 to B on condition that he shall marry A's daughter, C. At the date of the transfer, C was dead. The transfer is void.
- (c.) A transfers Rs. 500 to B on condition that she shall murder C. The transfer is void.
- (d.) A transfers Rs. 500 to his niece C if she will desert her husband. The transfer is void.
- 26. Where the terms of a transfer of property impose a Fulfilment of condition precondition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

#### Illustrations.

- (a.) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D, and E. E dies. B marries with the consent of C and D. B is deemed to have fulfilled the condition.
- (b.) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D, and E. B marries without the consent of C, D, and E, but obtains their consent after the marriage. B has not fulfilled the condition.

27. Where, on a transfer of property, an interest therein is additional transfer to one created in favour of one person, and, by Conditional transfer to one person coupled with transfer

to another on failure of prior disposition.

the same transaction, an ulterior disposition of the same interest is made in favour of another, if the prior disposi-

tion under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

But, where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

### Illustrations.

- (a.) A transfers Rs. 500 to B on condition that he shall execute a certain lease within 3 months after A's death, and if he should neglect to do so, to C. B dies in A's lifetime. The disposition in favour of C takes effect.
- (b.) A transfers property to his wife; but, in case she should die in his lifetime, transfers to B that which he had transferred to her. A and his wife perish together under circumstances which make it impossible to prove that she died before him. The disposition in favour of B does not take effect.
- 23. On a transfer of property, an interest therein may be created to accrue to any person with the Ulterior transfer condicondition superadded that, in case a tional on happening or not happening of specified event. specified uncertain event shall happen, such interest shall pass to another person, or that, in case a specified uncertain event shall not happen, such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections 10, 12, 21, 22, 23, 24, 25, and 27.
- 29. An ulterior disposition of the kind contemplated by the last preceding section cannot take effect fulfilment of condition subunless the condition is strictly fulfilled. sequent.

### Illustration.

A transfers Rs. 500 to B to be paid to him on his attaining his majority or marrying with a proviso that if B dies a minor, or marries without C's consent, the Rs. 500 shall go to D. B marries, when only 17 years of age, without C's consent. The transfer to D takes effect.

Prior disposition not affected by invalidity of ulterior disposition.

30. If the ulterior disposition is not valid, the prior disposition is not affected by it.

#### Illustration.

A transfers a farm to B for her life, and, if she do not desert her husband, to C. B is entitled to the farm during her life as if no condition had been inserted.

Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.

31. Subject to the provisions of section 12, on a transfer of property, an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in

case a specified uncertain event shall not happen.

#### Illustrations.

- (a.) A transfers a farm to B for his life, twith a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the farm.
- (b.) A transfers a farm to B, provided that, if B shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.
- 32. In order that a condition that an interest shall cease to exist may be valid, it is necessary that Such condition must not the event to which it relates be one which be invalid. could legally constitute the condition of the creation of an interest.
- Transfer conditional on performance of act, no time being specified for perform-

Y

33. Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is

broken when he renders impossible, permanently or for an indefinite period, the performance of the act. See - 12 3 Sha . Ac

34. Where an act is to be performed by a person either as a condition to be fulfilled before an in-Transfer conditional on terest created on a transfer of property performance of act, time beis enjoyed by him, or as a condition on ing specified. the non fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by

Act IV., 1882.-2.

the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall, as against him, be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But, if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition; rendered impossible or indefinitely postponed, the condition shall, as against him, be deemed to have been fulfilled.

### Election.

85. Where a person professes to transfer property which he has no right to transfer, and, as part of the same transaction, confers any benefit on the owner of the property, such owner must elect either to confirm such transfer, or to dissent from it; and, in the latter case, he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

subject neveriheless,

where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

### Illustration.

The farm of Sultanpur is the property of C, and worth Rs. 800. A, by an instrument of gift, professes to transfer it to B, giving by the same instrument Rs. 1,000 to C, C elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case, A dies before the election. His representative must, out of the Rs. 1,000, pay Rs. Soo to B.

The rule in the first paragraph of this section applies wnetner the transferor does or does not believe that which he professes to transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who, in his one capacity, takes a benefit under the transaction, may, in another, dissent therefrom.

Exception to the last-preceding four rules .- Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect, and of those circumstances which would influence the judgment of a reasonable man in making an election. or if he waives enquiry into the circumstances.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

### Illustration.

A transfers to B an estate to which C is entitled, and, as part of the same transaction, gives C a coal-mine. C takes possession of the mine, and exhausts it. He has thereby confirmed the transfer of the estate to B.

If he does not, within one year after the date of the transfer, signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and if he does not comply with such requisition within a reasonable time after he has received it. he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postpone i until the disability ceases, or until the election is made by some competent authority.

# Apportionment.

Apportionment of periodi-

cal payments on determination of interest of person entitled.

36. In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends, and other periodical payments in the nature of income, shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

Apportionment of benefit and held in several shares, and thereupon of obligation on severance. the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed, and that the severance does not substantially increase the burden of the obligation; but, if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose:

Provided that no person on whom the burden of the obligation lies snall be answerable for failure to discharge it in manner provided by this section unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the Local Government, by notification in the official Gazette, so directs.

#### Illustrations.

- (a.) A sells to B, C, and D. a house situate in a village, and leases ito E at an annual rent of Rs. 30 and delivery of one fat sheep. B having provided half the purchase-money, and C and D one quarter each. E, having notice of this, must pay Rs. 15 to B, Rs. 7½ to C, and Rs. 7½ to D, and must deliver the sheep according to the joint direction of B, C, and D.
- (b.) In the same case, each house in the village being bound to provide to days' labour each year on a dyke to prevent inundation, E had agreed, as a term of his lease, to perform this work for A. B, C, and D severally require E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten days' work in all according to such directions as B, C, and D may join in giving.

# B .- Transfer of Immoveable Property.

38. Where any person, authorized only under circumstances

Transfer by person authorized in their nature variable to dispose of immoveable property, transfer such procumstances to transfer.

perty for consideration alleging the

existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

#### Illustration.

A, a Hindu window, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable enquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary; and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

Transfer where third person or a provision for advancement or maris entitled to maintenance. It is entitled to maintenance.

#### Illustration.

A, a Hindu, transfers Sultanpur to his sister-in-law B in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's property, and agrees with her that, if she is dispossessed of Sultanpur, A will transfer to her an equal area out of such of several other specified villages in his possession as she may elect. A sells the specified villages to C, who buys in good faith, without notice of the agreement. B is dispossessed of Sultanpur. She has no claim on the villages transferred to C.

Burden of obligation imposing restriction on use of land.

Burden of obligation imposing restriction on use of land.

Burden of obligation imposing restriction on use of land.

Impose a property of any interest in the impose and the latter property, or to compel its enjoyment in a particular manner. Or

where a third person is entitled to the benefit of an obligation or of obligation annexed to ownership, but not amounting to interest or easement.

where a third person is entitled to the benefit of an obligation arising out of contract, and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon.



Such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

#### Illustration.

A contracts to sell Sultanpur to B. While the contract is still in force, he sells Sultanpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A.

- Transfer by ostensible interested in immoveable property, a person is the ostensible owner of such property, and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it, provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.
- Transfer by person having authority to revoke former transfers any immoveable property reauthority to revoke former and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

#### Illustration.

A lets a house to B, and reserves power to revoke the lease, if, in the opinion of a specified surveyor, B Should make a use of it detrimental to its value. Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

48. Where a person erroneously represents that he is authorized to transfer certain immoveable pro-

Transfer by unauthorized person who subsequently acquires interest in property transferred.

ized to transfer certain immoveable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee,

operate on any interest which the transferor may acquire in such property, at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

#### Illustration.

A, a Hindu, who has separated from his father B, sells to C three fields, X, Y, and Z, representing that A is athorized to transfer the same. Of these fields, Z does not belong to A, it having been retained by B on the partition; but, on B's dying, A, as heir, obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him.

Transfer by one co-owner.

Transfer by one co-owner.

Perty, legally competent in that behalf, transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or partenjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part-enjoyment of the house.

45. Where immoveable property is transferred for considerJoint transfer for consideration to two or more persons, and such
ation.

consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract
to the contrary, respectively entitled to interests in such property
identical, as mearly as may be, with the interests to which they were
respectively entitled in the fund; and where such consideration is
paid out of separate funds belonging to them respectively, they
are, in the absence of a contract to the contrary, respectively entitled
to interests in such property in proportion to the shares of the
consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

46. Where immoveable property is transferred for consideration tion by persons having distinct interests by persons having distinct therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.



#### Illustrations.

- (a) A, owing a moiety, and B and C, each a quarter share, of mouza Sultanpur exchange an eithth share of that mouza for a quarter share of mouza Lalpura. There being no agreement to the contrary, A is entitled to an eighth share in Lalpura, and B and C each to a sixteenth share in that mouza.
- (b) A, being entitled to a life-interest in mouza Atrali, and B and C, to the reversion, sell the mouza for Rs. 1,000. A's life-interest is ascertained to be worth Rs. 600; the reversion, Rs. 400. A is entitled to receive Rs. 600 out of the purchase-money; B and C to receive Rs. 400.
- 47. Where several co-owners of immoveable property transfer Transfer by co-owners of a share therein without specifying that share in common property. the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal, proportionately to the extent of such shares.

### Illustration.

- A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share, in mouza Sultanpur, transfer a two-anna share in the mouza to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer, one-anna share is taken from the share of A, and half-anna share from each of the shares of B and C.
- 48. Where a person purports to create by transfer at different Priority of rights created times rights in or over the same immove-by transfer. able property, and such rights cannot all exist or be exercised to their full extent together, each later-created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.
- 49. Where immoveable property is transferred for consider-Transferee's right under ation, and such property or any part policy. thereof is, at the date of the transfer, insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.
- 50. No person shall be chargeable with any rents or profits

  Rent bona fide paid to of any immoveable property which he holder under defective title. has, in good fath, paid or delivered to

any person of whom he, in good faith, held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

#### Illustration.

A lets a field to B at a rent of Rs. 50, and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

Improvements made by improvement on the property, believing in good faith that he is absolutely entitled therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market-value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops, and to free ingress and egress to gather and carry them.

52. During the active prosecution in any Court having author-Transfer of property pendity in British India, or established beyond ing suit relating thereto. the limits of British India by the Governor-General in Council, tof a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding, so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court, and on such terms as it may impose.

Fraudulent transfer.

Fraudulent transfer.

To defraud prior or subsequent transferes thereof for consideration, or coowners or other persons having an interest in such property, or to
defeat or delay the creditors of the transferor, is voidable at the
option of any person so defrauded, defeated, or delayed.

Where the effect of any transfer of immoveable property is to defraud, defeat, or delay any such person, and such transfer is made gratuitously, or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.

### CHAPTER III.

### OF SALES OF IMMOVEABLE PROPERTY.

"Sale" defined. "Sale" is a transfer of cwnership in exchange for a price paid or promised or part-paid and part-promised.

Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.\*

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.\*

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in, or charge on, such property.

55. In the absence of a contract to the contrary, the buyer Rights and liabilities of and the seller of immoveable property buyer and seller. respectively are subject to the liabilities,

<sup>\*</sup> Paras 2 and 3 of s. 54 extend to every cantonment in British India—See the Cantonments Act (XIII. of 1889), s. 32 (1). These paragraphs shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act (III. of 1877) under the power conferred by the first section of that Act or otherwise.—See s. 1, supra.

and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:—

- (1.) The seller is bound-
  - (a) to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;
- (b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;
  - questions put to him by the buyer in respect to the property or the title thereto;
- (d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;
  - (e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents;
- (f) to give, on being so required, the buyer or such person as he directs, such possession of the property as its nature admits;
- (g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.
- (2.) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists, and that he has power to transfer the same:

Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property in incumbered, or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is, for the whole or any part thereof, from time to time, vested.

(3.) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power:

Provided that (a), where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and (b), where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But, in case (a), the seller, and in case (b), the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents, and furnish such true copies thereof or extracts therefrom as he may require; and, in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncancelled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

- (4.) The seller is entitled—
  - (a) to the rents and profits of the property till the ownership thereof passes to the buyer;
  - (b) where the ownership of the property has passed to the buyer before payment of the whole of the purchasemoney, to a charge upon the property in the hands of the buyer for the amount of the purchase-money or any part thereof remaining unpaid, and for interest on such amount or part.
- (5.) The buyer is bound—
  - (a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest:
  - (b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such

person as he directs, provided that, where the property is sold free from incumbrances, the buyer may retain, out of the purchase-money, the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;

- (c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury, or decrease in value of the property not caused by the seller;
- (d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6.) The buyer is entitled-

- (a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;
- (b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, with notice of the payment to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery, and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract, or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph 1, clause (a), and paragraph 5, clause (a), is fraudulent.

Sale of one of two properties subject to a common charge, buyer is, as against the seller, in the absence of a contract to the contrary, entitled to have the charge satisfied out of the other property, so far as such property will extend.

# Discharge of Incumbrances on Sale.

- Provision by Court for incumbrances, and sale freed not, is sold by the Court, or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court,—
  - (1) in the case of an annual or monthly sum charged on the property, for of a capital sum charged on a determinable interest in the property,—of such amount as, when invested in securities of the Government of India, the Court considers will be sufficient, by means of the interest thereof, to keep down, or otherwise provide tor, that charge, and,
  - (2) in any other case of a capital sum charged on the property,—of the amount sufficient to meet the incumbrance and any interest due thereon.

But, in either case, there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency, of further costs, expenses, and interest, and any other contingency except depreciation of investments not exceeding one-tenth part of the original amount to be paid in, unless the Court, for special reasons (which it shall record), thinks fit to require a larger additional amount.

- (b) The reupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons to be recorded in writting, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.
- (c) After notice served on the persons interested in, or entitled to, the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

- (d) An appeal shall lie from any declaration, order, or direction under this section as if the same were a decree.
- (e) In this section "Court" means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction; (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate; (3) any other Court which the Local Government may, from time to time, by notification in the official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

### CHAPTER IV.

### OF MORIGAGES OF IMMOVEABLE PROPERTY AND CHARGES.

58. (a) A mortgage is the transfer of a n interest in specific "Mortgage," "mortgageor," "mortgageor," "mortgageenoney," and "mortgage-deed" defined. "wanc d or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money; and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold, and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage, and the mortgagee a simple mortgagee.

Mortgage by conditional sale. (c) Where the mortgagor ostensibly sells the mortgaged property—

on condition that, on default of payment of the mortgagemoney on a certain date, the sale shall become absolute, or on condition that, on such payment being made, the sale shall become void, or

on condition that, on such payment being made, the buyer shall

transfer the property to the seller,

the transaction is called a mortgage by conditional sale, and the mortgagee a mortgagee by conditional sale.

(d) Where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property, and to appropriate them in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest, and partly in payment of the mortgage-money, the transaction is called a usufructuary mortgage, and the mortgagee a usufructuary mortgagee.

(e) Where the mortgagor binds himself to repay the mortgagemoney on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the

transaction is called an English mortgage.

59.\* Where the principal money secured is one hundred.

Mortgage when to be by rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor, and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a "registered instrument" signed and attested as aforesaid, or (except in the case of a

simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi, "Rangoon, Moulmein, Bassein, and Akyab," by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.

† The words quoted have been substituted for the words " an instru-

ment" by Act VI. of 1904, s. 3.

<sup>\*</sup> S. 59 extends to every cantonment in British India—See the Cantonments Act (XIII. of 1889), s. 32 (1). S. 59 shall not ext. nd, or be extended, to any district or tract of country for the time being excluded from the operation of the Indian Registration Act under the power conferred by the first section of that Act, or otherwise.—See s. 1, supra.

<sup>†</sup> These quoted words have been substituted for the original ones—
"and Rangoon"—by s. 4 of Act VI. of 1904.

# Rights and Liabilities of Mortgagor.

Right of mortgagor to redeem. the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-deed, if any, to the Mortgagor; (b) where the mortgage is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor, either to retransfer the mortgaged property to him, or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgage has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties, or by order of a Court.

The right conferred by his section is called a right to redeem, and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass, or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Nothing in this section shall entitle a person interested in a Redemption of portion of share only of the mortgaged property to mortgaged property. redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgage ee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

61. A mortgagor seeking to redeem any one mortgage shall,
Right to redeem one of in the absence of a contract to the contwo properties separately trary, be entitled to do so without paying
mortgaged. any money due under any separate mortgage made by him, or by any person through whom he claims, on
property other than that comprised in the mortgage which he seeks
to redeem.

#### Illustration.

A, the owner of farms Z and Y, mortgages Z to B for Rs. 1,000. A afterwards mortgages Y to B for Rs. 1,000, making no stipulation as to any additional charge on Z. A may institute a suit for the redemption of the mortgage on Z alone.

Act IV., 1882.-3.

Right of usufructuary mortgagor to recover possession.

62. In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property—

- (a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property—when such money is paid;
- (b) where the mortgagee is authorized to pay himself from such rents and profits the interest of the principal money—when the term (if any) prescribed for the payment of the mortgage-money has expired, and the mortgagor pays or tenders to the mortgagee the principal money, or deposits it in Court as hereinafter provided.

63. Where mortgaged property in possession of the mortgagee Accession to mortgaged has, during the continuance of the mortgager, upon redemption, shall, in the absence of a contract to the contrary, be entitled, as against the mortgagee, to such accession.

Where such accession has been acquired at the expense of the Accession acquired in virmortgagee, and is capable of separate tue of transferred ownership. possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture, or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, at the same rate of interest.

In the case last mentioned, the profits, if any, arising from the accession, shall be credited to the mortgagor.

Where the mortgage is usufructuary, and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession, shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

64. Where the mortgaged property is a lease for a term of Renewal of mortgaged years, and the mortgagee obtains a renelease. wal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

Implied contracts by mortgagor. 65. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee—

- (a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same;
- (b) that the mortgagor w.ll defend, or, if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto;
- (c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property;
- (d) and, where the mortgaged property is a lease for a term of years, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee, have been paid, performed, and observed down to the commencement of the mortgage; and that the mortgager will, so long as the security exists, and the mortgage is not in possession of the mortgaged property, pay the rent reserved by the lease or, if the lease be renewed, the renewed lease, perform the conditions contained therein, and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contract;

and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as and when it becomes due, and will, at the proper time, discharge the principal money due on such prior incumbrance.

Nothing in clause (c), or in clause (d), so far as it relates to the payment of future rent, applies in the case of a usufructuary mortgage.

The benefit of the contracts mentioned in this section shall be annexed to, and shall go with, the interest of the mortgagee as such, and may be enforced by every person in whom that interest is, for the whole or any part thereof, from time to time, vested.

Waste by mortgagor in liable to the mortgaged property is not possession. liable to the mortgagee for allowing the possession. property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto if the security is insufficient, or will be rendered insufficient by such act.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one third, or, if consisting of buildings, exceeds by one half, the amount for the time being due on the mortgage.

## Rights and Liabilities of Morigagee.

Right to foreclosure or gagee has, at any time after the mortgagesale.

Right to foreclosure or gagee has, at any time after the mortgagesale.

money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold.

A suit to obtain an order that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for forecloure.

Nothing in this section shall be deemed-

- (a) to authorize a simple mortgagee as such to institute a suit for foreclosure, or a usufructuary mortgagee, as such, to institute a suit for foreclosure or sale, or a mortgagee by conditional sale, as such, to institute a suit for sale; or
- (b) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or
- (c) to authorize the mortgagee of a railway, canal, or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or
- (d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

Right to sue for mortgagemoney. 68. The mortgagee has a right to sue the mortgagor for the mortgagemoney in the following cases only—

- (a) where the mortgagor binds himself to repay the same;
- (b) where the mortgagee is deprived of the whole or part of
  his security by, or in consequence of, the wrongful
  act or default of the mortgagor;
- (c) where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person.

Where, by any cause other than the wrongful act or default of the mortgager or mortgagee, the mortgaged property has been wholly or partially destroyed, or the security is rendered insufficient as defined in section 66, the mortgage may require the mortgager to give him, within a reasonable time, another sufficient security for his debt, and, if the mortgager fails so to do, may sue him for the mortgagemoney.

69. A power conferred by the mortgage-deed on the mortpower of sale when valid.

payment of the mortgage-money, the mortgaged property or any
part thereof, without the intervention of the Court, is valid in the
following cases, "and in no others" (namely)—

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan, or Buddhist, "or a member of any other race, sect, tribe, or class, from time to time specified in this behalf by the Local Government, with the previous sanction of the Governor-General in Council, in the local official Gazette;"\*

(b) where the mortgagee is the Secretary of State for India in Council;

(c) where the mortgaged property or any part thereof is situate within the town of Calcutta, Madras, Bombay, Karachi, "Rangoon, Moulmein, Bassein, or Akyab."

† In clause (c) of s. 69, the words quoted have been substituted for the words, "or Rangoon," by Act VI. of 1904, s. 4.

<sup>\*</sup> The words quoted above in s. 69, para. 1, and those in clause (a), have been inserted by the Transfer of Property Act (1882) Amendment Act (III. of 1885), s. 5.

But no such power shall be exercised unless and until-

(1) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(2) some interest under the mortgage, amounting at least to five hundred rupees, is in arrear, and unpaid for three months after becoming due.

When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized or improper or irregular exercise of the power, shall have his remedy in damages against the person exercising the power.

The money which is received by the mortgagee arising from the sale after discharge of prior incumbrances (if any) to which the sale is not made subject, or after payment into Court, under section 57, of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first in payment of all costs, charges, and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly in discharge of the mortgage-money and costs and other money (if any) due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

Nothing in the former part of this section applies to powers conferred before this Act comes into force.

The powers and provisions contained in section 6 to 19 (both inclusive) of the Trustees' and Mortgagees' Powers Act, 1866,\* shall be deemed to apply to English mortgages wherever in British India the mortgaged property may be situate, when neither the mortgager nor the mortgagee is a Hindu, Muhammadan, or Buddhist, "or a member of any other race, sect, tribe, or class from time to time specified in this behalf by the Local Government, with the previous sanction of the Governor-General in Council, in the local official Gazette."†

<sup>\*</sup> Act XXVIII. of 1866.

<sup>†</sup> The words quoted above in the last paragraph of s. 69 have been inserted by the Transfer of Property Act (1882) Amendment Act (III. of 1885), s. 5.

70. If, after the date of a mortgage, any accession is made Accession to mortgaged to the mortgaged property, the mortproperty.

gagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

#### Illustrations.

- (a.) A mortgages to B a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, B is entitled to the increase.
- (b.) A mortgages a certain plot of building land to B, and afterwards erects a house on the plot. For the purposes of his security, B is entitled to the house as well as the plot.
- 71. When the mortgaged property is a lease for a term of Renewal of mortgaged years, and the mortgagor obtains a lease.

  renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease.
- 72. When, during the continuance of the mortgage, the mort-Rights of mortgagee in gagee takes possession of the mortgaged possession. gagee takes possession of the mortgaged property, he may spend such money as is necessary—
  - (a) for the <u>due management of the property and the collection of the rents and profits thereof</u>;
  - (b) for its preservation from destruction, forfeiture, or sale;
  - (c) for supporting the mortgagor's title to the property;
  - (d) for making his own title thereto good against the mortgagor; and,
  - (e) when the mortgaged property is a renewable lease-hold, for the renewal of the lease;

and may, in the absence of a contract to the contrary, add such money to the principal money at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of nine per cent. per annum.

Where the property is, by its nature, insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the principal money, with the same priority and with interest at the

same rate. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed, or (if no such amount is therein specified) two-thirds of the amount that would be required, in case of total destruction, to reinstate the property insured.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

- 73. Where mortgaged property is sold through failure to pay

  Charge on proceeds of rearrears of revenue or rent due in respect
  thereof, the mortgagee has a charge on
  the surplus (if any) of the proceeds, after payment thereout of the
  said arrears, for the amount remaining due on the mortgage, unless
  the sale has been occasioned by some default on his part.
- Right of subsequent mortgagee to pay off prior mortgagee. time after the amount due on the next
  prior mortgage has become payable,
  tender such amount to the next prior
  mortgagee, and such mortgagee is bound to accept such tender,
  and to give a receipt for such amount; and (subject to the provisions of the law\* for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining
  such receipt, acquire, in respect of the property, all the rights and
  powers of the mortgagee as such, to whom he has made such
  tender.
- Rights of mesne mortgagee as regards redemption, foreclosure, and against prior and subsequent mortgagees. as regards redemption, foreclosure, and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor.
- 76. When, during the continuance of the mortgage, the Liabilities of mortgagee takes possession of the mortgaged property—
  - (a) he must manage the property as a person of ordinary prudence would manage it if it were his own;

<sup>\*</sup> See the Indian Regulation Act (III. of 1877).

- (b) he must use his best endeavours to collect the rents and profits thereof;
- (c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold;
- (d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money;
- (e) he must not commit any act which is destructive or permanently injurious to the property;
- (f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy, or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money;
- (g) he must keep clear, full, and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported;
- (h) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses mentioned in clauses (c) and (d) and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest on the mortgagemeney, and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money; the surplus (if any) shall be paid to the mortgagor;

(1) when the mortgagor tenders or deposits, in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwith-standing the provisions in the other clauses of this section, account for his gross receipts from the mortgaged property from the date of the tender, or from the earliest time when he could take such amount out of Court, as the case may be.

If the mortgagee fail to perform any of the duties imposed

Loss occasioned by his upon him by this section, he may,
default. when accounts are taken in pursuance
of a decree made under this chapter, be debited with the loss (if
any) occasioned by such failure.

77. Nothing in section 76, clauses (b), (d), (g), and (h),

Receipts in lieu of interest. applies to cases where there is a contract between the mortgagee and the mortgager that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

### Priority.

78. Where, through the fraud, misrepresentation, or gross
Postponement of prior neglect of a prior mortgagee, another
mortgagee. person has been induced to advance
money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Mortgage to secure uncertain amount when maximum is expressed.

Subsequent mortgage of the same property shill, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

#### Illustration.

A mortgages Sultanpur to his bankers, B & Co., to secure the balance of his account with them to the extent of Rs. 10,000. A then mortgages Sultanpur to C, to secure Rs. 10,000, C having notice of the mortgage to B & Co., and C gives notice to B & Co. of the second mortgage. At the

date of the second mortgage, the balance due to B & Co. does not exceed Rs. 5,000. B & Co. subsequently advance to A sums making the balance of the account against him exceed the sum of Rs. 10,000. B & Co. are entitled, to the extent of Rs. 10,000, to priority over C.

80. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security. And, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

## Marshalling and Contribution.

Marshalling securities.

Marshalling securities to another person who t

Contribution to mortgaged owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt, and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute reteably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section 81 to the claim of the second mortgagee.

## Deposit in Court.

83. At any time after the principal money has become payPower to deposit in Court able, and before a suit for redemption of
money due on mortgage. the mortgaged property is barred, the
mortgagor, or any other person entitled to institute such suit, may
deposit, in any Court in which he might have instituted such suit,
to the account of the mortgagee, the amount remaining due on the
mortgage.

The Court shall thereupon cause written notice of the deposit Right to money deposited to be served on the mortgagee, and the by mortgagor. The mortgagee may, on presenting a petition (verified in manner prescribed by law\* for the verification of plaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed if then in his possession or power, apply for and receive the money, and the mortgage-deed so deposited shall be delivered to the mortgagor or such other person as aforesaid.

Cessation of interest. said has tendered or deposited in Court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender, or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, as the case may be.

Nothing in this section, or in section 83, shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money.

85 to 90-[Repealed by Act V. of 1908.]

## Redemption.

91. Besides the mortgagor, any of the following persons may
Who may sue for redemption. redeem, or institute a suit for redemption of, the mortgaged property:—

<sup>\*</sup> See the Code of Civil Procedure (Act XIV. of 1882), ss. 51 and 52.

- (a) Any person (other than the mortgagee of the interest sought to be redeemed) having any interest in, or charge upon, the property;
- (b) any person having any interest in, or charge upon, the right to redeem the property;
- (c) any surety for the payment of the mortgage-debt or any part thereof;
- (d) the guardian of the property of a minor mortgagor on behalf of such minor;
- (e) the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot;
- (f) the judgment-creditor of the mortgagor, when he has
  obtained execution by attachment of the mortgagor's
  interest in the property;
- (g) a creditor of the mortgagor who has, in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property.

# 92 to 94. - [Repealed by Act V. of 1908.]

Ohere one of several mortgagors redeems the mort-Charge of one of several gaged property, and obtains possession co-mortgagors who redeems. thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.

# 96. 97 .- [Repealed by Act V. of 1908.]

# Anomalous Morigages.

98. In the case of a mortgage, not being a simple mortgage, Mortgage not described in section 53, clauses (b), (c), (d), and (e). a mortgage by conditional sale, usufructuary mortgage, or an English mortgage, or a combination of the first and third, or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

Market No.

# 99 .- [Repealed by Act V. of 1908.]

### Charges.

100. Where immoveable property of one person is, by act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections S1 and S2\* shall, so far as may be, apply to the person having such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his

trust.

101. Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit.

## Notice and Tender.

Service or tender on or to is to be served or made under this agent.

Chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person, or otherwise duly authorized to accept such service or tender, shall be deemed sufficient.

Where the person or agent on whom such notice should be served cannot be found in the said district, or is unknown to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient.

Where the person or agent to whom such tender should be made cannot be found within the said district, or is unknown to the person desiring to make the tender, the latter person may

<sup>\*</sup> Here certain words, repealed by Act V. of 1903, have been omitted.

deposit in such Court as last aforesaid the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

103. Where, under the provisions of this Chapter, a notice is Notice, &c., to or by per- to be served on or by, or a tender or deson incompetent to contract. posit made or accepted or taken out of Court by, any person incompetent to contract,\* such notice may be served, or tender or deposit made, accepted, or taken, by the legal curator of the property of such person; but, where there is no such curator, and it is requisite or desirable, in the interests of such person, that a notice should be served, or a tender or deposit made, under the provisions of this Chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian ad litem for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acis which could or ought to be done by such person if he were competent to contract; and the provisions of Chapter XXXI. of the Code of Civil Procedure; shall. so far as may be, apply to such application, and to the parties thereto, and to the guardian appointed thereunder.

Power to make rules.

Power to make rules.

Power to make rules.

Power to make rules.

cature subject to its superintendence, the provisions contained in this Chapter.

### CHAPTER V.

OF LEASES OF IMMOVEABLE PROPERTY.

105. A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service, or any other thing of value, to be rendered,

Land the state of the state of

<sup>\*</sup> As to persons competent to contract, see ss, 11 and 12 of the Indian Contract Act (IX. of 1872).

<sup>†</sup> This reference to Ch. XXXI. of the Civil Procedure Code (Act X. of 1877) should now be read as applying to Ch. XXXI. of the Civil Procedure Code (Act XIV. of 1882).—See s. 3 of the latter Act.

periodically or on specified occasions, to the transferor by the transferee who accepts the transfer on such terms.

The transferor is called the lessor, the transferee is called the premium, "Lessor," "lessee," lessee, the price is called the premium, and the money, share, service, or other thing to be so rendered, is called the rent.

Duration of certain leases contrary, a lease of immoveable property, in absence of written contract for agricultural or manufacturing purposes, shall be deemed to be a lease from year to year terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

107.\* A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by registered instrument.

"All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession:

Provided that the Local Government may, with the previous sanction of the Governor-General in Council, from time to time, by notification in the local official Gazette, direct that leases of immoveable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any

<sup>\*</sup> S. 107 extends to every cantonment in British India.—See the Cantonments Act (XIII. of 1889), s. 32 (1). S. 107 shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act (III. of 1877) under the power conferred by the first section of that Act or otherwise.—See s. 1, supra.

class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession."\*

Rights and liabilities of trary, the lessor and the lessee of immoveable property, as against one another respectively, possess the rights and are subject to the liabilities mentioned in the rules next following or such of them as are applicable to the property leased:—

# A .- Rights and Lizbilities of the Lessor.

- (a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, or of which the former is, and the latter is not, aware, and which the latter could not with ordinary care discover:
- (b) the lessor is bound, on the lessee's request, to put him in possession of the property:
- (c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease, and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to, and go with, the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

### B .- Rights and Liabilities of the Lessee.

- (d) If, during the continuance of the lease, any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease:
- (e) if, by fire, tempest, or flood, or violence of an army or of a mob, or other irres stible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void:

<sup>\*</sup> In s. 107, the two concluding paragraphs quoted have been substituted for the original second paragraph thereof by Act VI. of 1904, s. 5. Act IV., 1882,—4.



Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision:

- (/) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor:
- (g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor:
- (h) the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth; provided he leaves the property in the state in which he received it:
- (t) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee, and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them:
- (j) the lessee may transfer absolutely, or by way of mortgage or sub-lease, the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease.

Nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer, or lessee:

- (k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest:
- (l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf:

- (m) the lessee is bound to keep, and, on the termination of the lease, to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter up in the property, and inspect the condition thereof, and give or leave notice of any defect in such condition; and when such defect has been caused by any act or default on the part of the lessee, his servants, or agents, he is bound to make it good within three months after such notice has been given or left:
- (n) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor:
- (o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell timber, pull down or damage buildings, work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto:
- (p) he must not, without the lessor's consent, erect on the property any permanent structure except for agricultural purposes:
- (q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.
- Rights of lessor's transferee. thereof, or any part of his interest therein, the transferee in the absence of a
  contract to the contrary, shall possess all the rights and, if the
  lessee so elects, be subject to all the liabilities of the lessor as to
  the property or part transferred so long as he is the owner of it;
  but the lessor shall not, by reason only of such transfer, cease to
  be subject to any of the liabilities imposed upon him by the lease
  unless the lessee elects to treat the transferee as the person liable
  to him:

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.



The lessor, the transferee, and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

Exclusion of day on which term commences.

Exclusion of day on which term commences.

Such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Where the time so limited is a year, or a number of years, in Duration of lease for a the absence of an express agreement to year. the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

Determination of lease. 111. A lease of immoveable property determines—

- (a) by efflux of the time limited thereby:
- (b) where such time is limited conditionally on the happening of some event—by the happening of such event:
- (c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event:
- (d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right:
- (e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor by mutual agreement between them:
  - (f) by implied surrender:
- (g) by forfeiture, that is to say—(1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter, or the lease shall become void; or (2) in case the lessee renounces his character as such by setting up a title in



a third person, or by claiming title in himself; and in either case the lessor or his transferee does some act showing his intention to determine the lease:

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

### Illustration to Clause (f).

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease detemines thereupon.

112. A forfeiture under section III, clause (g), is waived by
Waiver of forfeiture.

Waiver of forfeiture.

acceptance of rent which has become
due since the forfeiture, or by distress
for such rent, or by any other act on the part of the lessor showing
an intention to treat the lease as subsisting:

Provided that the lessor is aware that the forfeiture has been incurred:

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

118. A notice given under section ττι, clause (λ), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it, showing an intention to treat the lease as subsisting.

#### Illustrations.

- (a.) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.
- (b) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived.
- Relief against forfeiture by forfeiture for non-payment of rent, and the lessor sues to eject the lesser, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs



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of the suit, or gives such security as the Court thinks sufficient for making such payment within fiften days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture, and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

115. The surrender, express or implied, of a lease of im-Effect ct surrender and moveable property does not prejudice foreiture on under-leases. an under lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to, and enforceable by, the lessor.

The forfeiture of such a lease annuls all such under leases, except where such forfeiture has been procured by the lessor in fraud of the under-lessees, or relief against the forfeiture is granted under section 114.

Effect of holding over.

Effect of holding over.

Description:

Effect of holding over.

Description:

Effect of holding over.

Description:

#### Illustrations.

- (a.) A lets a house to B for five years. B underlets the house to C at a monthly rest of Rs. 100. The five years expire, but C continues in possession of the house, and pays the rest to A. C's lease is renewed from month to month.
- (b.) A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.
- Exemption of leases for agricultural purposes, except in so far as the Local Government, with the previous sanction of the Governor General in Council, may, by notification published in the local official Gazette, declare all or any of such provisions to be so applicable "in the case of all or

any of such leases" together with, or subject to, those of the local law (if any) for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

### CHAPTER VI.

#### OF EXCHANGES.

118. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange."

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

- Right of party deprived of deprived of the thing or part thereof he thing received in exchange. has received in exchange, by reason of any defect in the title of the other party, is entitled at his option, to compensation, or to the return of the thing transferred by him.
- 120. Save as otherwise provided in this chapter, each party Rights and liabilities of has the rights, and is subject to the liabiparties.

  lities, of a seller as to that which he gives, and has the rights, and is subject to the liabilities of a buyer as to that which he takes.

Exchange of money.

Exchange of money.

each party thereby warrants the genuineness of the money given by him.

# CHAPTER VII.

### OF GIFTS.

122. "Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person

<sup>\*</sup> The words in the first paragraph of s. 117 have been inserted by Act VI. of 1904, s. 6.

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called the donor to another called the donee, and accepted by or on behalf of the donee.

Acceptance when to be Such acceptance must be made made. during the lifetime of the donor, and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

128. For the purpose of making a gift of immoveable property, the transfer must be effected Transfer how effected. by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid, or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

property.

Gift of existing and future 124. A gift comprising both existing and future property is void as to the latter.

125. A gift of a thing to two or more donees, of whom one Gift to several, of whom does not accept it, is void as to the one does not accept. interest which he would have taken had he accepted.

126. The donor and donee may agree that, on the happen-When gift may be sus- ing of any specified event which does pended or revoked. not depend on the will of the donor, a gift shall be suspended or revoked; but a gift, which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

<sup>\*</sup> S 123 extends to every cantonment in British India - See the Cantonments Act (XIII. of 1889) s. 32 (1). S. 123 shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act (III. of 1877) under the power conferred by the first section of that Act or otherwise. - See s. I. subra.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

#### Illustrations.

- (a.) A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's lifetime. A may take back the field.
- (b.) A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs.; 90,000, but is void as to Rs. 10,000, which continue to belong to A.
- 127. Where a gift is in the form of a single transfer to the same person of several things, of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them, and refuse the others, altrough the former may be beneficial and the latter onerous.

A donee not competent to contract, and accepting property

Onerous gift to disqualified burdened by any obligation, is not bound by
person. his acceptance. But, if after becoming
competent to contract, and being aware of the obligation, he retains
the property given, he becomes so bound.

#### Illustrations.

- (a.) A has shares in X, a prosperous joint-stock company, and also shares in Y, a joint-stock company in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B all his shares in joint-stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.
- (b.) A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not, by his refusal, forfeit the money.
- 128. Subject to the provisions of section 127, where a gift consists of the donor's whole property, the done is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein.



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129. Nothing in this chapter relates to gifts of moveable pro-Saving of donations mortis causa and Muhammadan perty made in contemplation of death, of shall be deemed to affect any rule of Muhammadan Law, or, save as provided by section 123, any rule of Hindu or Buddhist Law.

### CHAPTER VIII.\*

### OF TRANSFERS OF ACTIONABLE CLAIMS.

Transfer of actionable only by the execution of an instrument in writing signed by the transfer or his duly-authorized agent, and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not:

Provided that every dealing with the debt or other actionable claim by the debtor or other person, from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer, or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings, and without making him a party thereto.

Exception.—Nothing in this section applies to the transfer of a marine or fire policy of insurance.

### Illustrations.

(i.) A owes money to B, who transfers the debt to C. B then demands the debt from A, who, not having received notice of the transfer as prescribed in section 131, pays B. The payment is valid, and C cannot sue A for the debt.

<sup>\*</sup> Ch. VIII. has been substituted for the original chapter by the Transfer of Property Act (II. of 1900), s. 4.

- (ii.) A effects a policy on his own life with an Insurance Company, and assigns it to a Bank for securing the payment of an existing or future debt. If A dies, the Bank is entitled to receive the amount of the policy, and to sue on it without the concurrence of A's executor, subject to the proviso in sub-section (1) of section 130, and to the provisions of section 132.
- 131. Every notice of transfer of an actionable claim shall be in Notice to be in writing, writing, signed by the transferor or his signed. agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.
- 182. The transferee of an actionable claim shall take it subject
  Liability of transferee of to all the liabilities and equities to which
  actionable claim. the transferor was subject in respect thereof at the date of the transfer.

#### Illustrations.

- (i.) A transfers to C a debt due to him by B, A being then indebted to B. C sues B for the debt due by B to A. In such suit B is entitled to set off the debt due by A to him, although C was unaware of it at the date of such transfer.
- (ii.) A executed a bond in favour of B under circumstances entitling the former to have it delivered up and cancelled. B assigns the bond to C for value and without notice of such circumstances. C cannot enforce the bond against A.
- Warranty of solvency of the debtor, the warranty, in the absence debtor. of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.
- 134. Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferrer, or recovered by the transferree, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, it any, belongs to the transferor or other person entitled to receive the same.
- Assignment of rights under marine or fire policy of insurance against fire, in whom the property in the subject insured shall be abso-



lutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

136. No Judge, legal practitioner, or officer connected with Incapacity of officers conany Court of Justice shall buy, or traffic nected with Courts of Justice. in or stipulate for, or agree to receive any share of, or interest in, any actionable claim, and no Court of Justice shall enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claim so dealt with by him as aforesaid.

137. Nothing in the foregoing sections of this chapter applies

Saving of negotiable instruments, &c. to stocks, shares, or debentures, or to instruments which are for the time being, by law or custom, negotiable, or to any mercantile document of title to goods.

Explanation—The expression, "mercantile document of title to goods," includes a bill-of-lading, dock-warrant, warehouse-keeper's certificate, railway-receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

## THE SCHEDULE.

REPEAL OF ACTS.

(See section 2.)

Year and Chapter.	Subject.	Extent of repeal.
27 Hen. VIII., c .10.	Uses	The whole.
13 Eliz., c. 5	Fraudulent convey-	The whole,
27 Eliz., c, 4	Fraudulent convey- ances.	The whole.
4 Wm. & Mary, c. 16.	Clandestine mort- gages.	The whole.

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# THE SCHEDULE—(continued.)

# (b.) Acts of the Governor-General in Council.

Number and yea	subject.	Extent of repeal.
IX. of 1842	Lease and Re-leas	The whole.
XXXI. of 1854	Modes of conveying land.	Section 17.
	Mesne-profits and Improvements.	Section 1; in the Title, the words. "to mesne-profits, and;" and in the Preamble, "to limit the liability for mesne-profits, and."
XXVII. of 1866	. Indian Trustees	Section 31.
IV. of 1872	Punjab Laws Act.	So far as it relates to Bengal Regulations I. of 1798 and
XX. of 1875	Central Provinces Laws Act.	So far as it relates to Bengal Regulations I. of 1708
XVIII. of 1876	Oudh Laws Act.	XVII. of 1806. So far as it relates to Bengal Regulation XVII. of 1806.
I. of 1877	Specific Relief Act	In sections 35 and 36, the words. "in writing."
	(c.) REGULATI	ONS.
Number and year.	Subject.	Extent of repeal.
Bengal Regulation 1. of 1798.	Conditional Sales.	The whole Regulation.
Bengal Regulation XVII. of 1806.	Redemption	The whole Regulation.
Sombay Regulation V. of 1827.	Acknowledgment of Debts: Interest: Mortgagees in Possession.	Section 15

# ACT XV. OF 1895.

# The Crown Grants Act, 1895.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

Received the G.-G.'s Assent on the 10th October 1895.

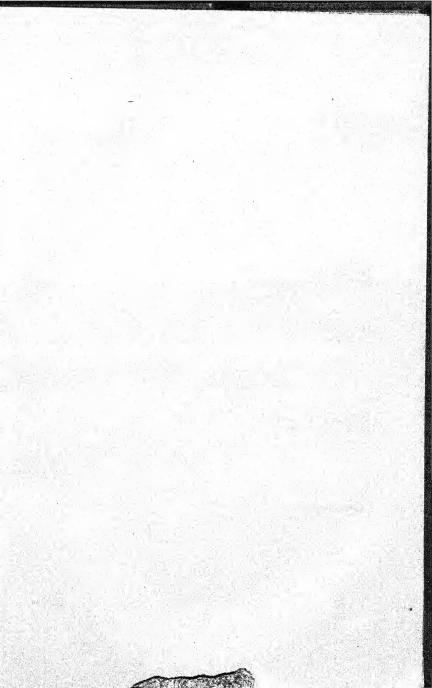
An Act to explain the Transfer of Property Act, 1882, so far as retates to grants from the Crown, and to remove certain doubts as to the powers of the Crown in relation to such grants.

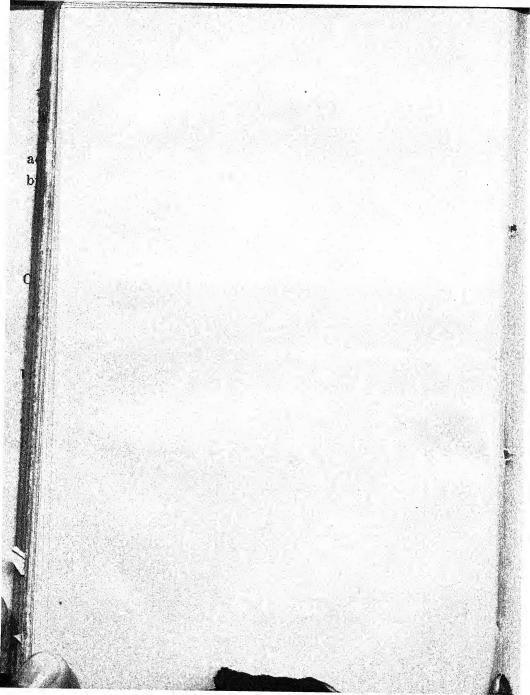
Whereas doubts have arisen as to the extent and operation of the Transfer of Property Act, 1882, and as to the power of the Crown to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, and it is expedient to remove such doubts; It is hereby enacted as follows—

Title, extent, and commencement.

1. (1) This Act may be called the
Crown Grants Act, 1895;

- (2) it extends to the whole of British India; and
- (3) it shall come into force at once.
- 2. Nothing in the Transfer of Property Act, 1882, contained Transfer of Property Act, shall apply, or be deemed ever to have applied, to any grant or other transfer of land or of any interest therein heretofore made or hereafter to be made by or on behalf of Her Majesty the Queen-Empress, her heirs, or successors, or by or on behalf of the Secretary of State for India in Council, to, or in favour of, any person whomsoever; but every such grant and transfer shall be construed and take effect as if the said Act had not been passed.
- 3. All provisions, restrictions, conditions, and limitations ever Crown-grants to take effect contained in any such grant or transfer as according to their tenor. any rule of law, Statute, or enactment of the Legislature to the contrary notwithstanding.





# THE INDIAN REGISTRATION ACT, 1908.

# ACT NO. XVI. OF 1908.

#### CONTENTS:

#### PART I.

#### PRELIMINARY.

#### SECTION.

- 1. Short title, extent, and commencement.
- 2. Definitions.

#### PART II.

- OF THE REGISTRATION-ESTABLISH-
  - 3. Inspector-General of Registration.
  - 4. Branch Inspector-General of Sindh.
  - 5. Districts and sub-districts.
- 6. Registrars and Sub-Registrars.
- 7. Offices of Registrar and Sub-Registrar.
- 8. Inspectors of Registration Offices.
- q. Military cantonments may be declared sub districts or districts.
- 10. Absence of Registrar or vacancy in his office.
- 11. Absence of Registrar on duty in his district.
- 12. Absence of Sub-Registrar or vacancy in his office.
- 13. Report of certain appointments and suspension and removal and dismissal of officers.
- 14. Remuneration and establishments of registering officers.
- 5. Seals of registering officers. 16. Register books and fire-proof boxes.

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#### PART III.

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# OF REGISTRABLE DOCUMENTS. SECTION,

- 17. Documents of which registration is compulsory.
- 18. Documents of which registration is optional.
- 19. Documents in language not understood by registering officer.
- 20. Documents, containing interlineations, blanks, erasures, or alterations.
- 21. Description of property and maps or plans.
- 22. Description of houses and land by reference to Government maps or surveys.

## PART IV.

# OF THE TIME OF PRESENTATION.

- 23. Time of presenting documents. 24. Documents executed by several
- persons at different times. 25. Provision where delay in presentation is unavoidable.
- 26. Documents executed out of British India.
- 27. Wills may be presented or deposited at any time.

#### PART V.

- OF THE PLACE OF REGISTRATION.
- 28. Place for registering documents relating to land.

Act XVI., 1908.-1.



#### SECTION.

- 29. Place for registering other documents
- 30. Registration by Registrars in certain cases.
- 31. Registration or acceptance for deposit at private residence.

#### PART VI.

# OF PRESENTING DOCUMENTS FOR REGISTRATION.

- 32. Persons to present documents
- 33. Powers of attorney recognizable for purposes of section 32.
- 34. Enquiry before registration by registering officer.
- 35. Procedure on admission and denial of execution respectively.

#### PART VII.

- OF ENFORCING THE APPEARANCE OF EXECUTANTS AND WITNESSES.
- 36. Procedure where appearance of executant or witness is desired.
- 37 Officer or Court to issue and cause service of summons.
- Persons exempt from appearance at registration-office.
- Law as to summonses, commissions, and witnesses.

# PART VIII.

- OF PRESENTING WILLS AND AUTHO-RITIES TO ADOPT...
- 40. Persons entitled to present wills and authorities to adopt. 41: Registration of wills and autho
  - rities to adopt.

# PART IX

OF THE DEPOSIT OF WILLS.

A LOUIS AVELLA

42. Deposit of wills.

#### SECTION.

- 43. Procedure on deposit of wills.
- 44. Withdrawal of sealed cover de-
- 45 Proceedings on death of deposi-
- Saving of certain enactments and powers of Courts.

#### PART X.

- OF THE EFFECTS OF REGISTRATION AND NON-REGISTRATION.
- 47. Time from which registered document operates.
- 48. Registered documents relating to property when to take effect against oral agreements.
- Effect of non-registration of documents required to be registered.
- 50. Certain registered documents relating to land to take effect against unregistered documents.

#### PART XI.

- OF THE DUTIES AND POWERS OF REGISTERING OFFICERS.
- (A)—As to the Register-books and Indexes.
- 51. Register books to be kept in the several offices.
- Duties of registering officer when document presented.
- Entries to be numbered consecutively.
- 54. Current Indexes and entries therein.
- 55. Indexes to be made by registering officers and their contents.
- Copy of entries in Indexes Nos.

   II., III., to be sent by Sub-Registrar to Registrar

Dictal Fee dogs

### SECTION.

- Registering officers to allow inspection of certain books and indexes and to give certified copies of entries.
- (B)—As to the Procedure on admitting to Registration.
- 58. Particulars to be endorsed on documents admitted to registration.
- 59. Endorsements to be dated and signed by registering officer.
- 60. Certificate of registration.
  61. Endorsements and certificate to be copied, and document returned.
- 62. Procedure on presenting document in language unknown to registering officer.
- Power to adminster oaths and record of substance of statements.
  - (C)—Special Duties of Sub-Regis-
- 64. Procedure where document relates to land in several subdistricts.
- 65. Procedure where document relates to land in several districts.
- (D)-Special Duties of Registrar.
- 66. Procedure after registration of documents relating to land.
- 67. Procedure after registration under section 30, sub-section (2).
- (E)—Of the Controlling Powers of Registrars and Inspectors-General.
- 68. Powers of Registrar to superintend and control Sub Registrars.
- 69. Power of Inspector-General to superintend registration offices and make rules.
- 70. Power of Inspector-General to remit fines.

#### SECTION.

#### PART XII.

# OF REFUSAL TO REGISTER.

- 71. Reasons for refusal to register to be recorded.
- 72. Appeal to Registrar from orders
  of Sub-Registrar refusing registration on ground other
  than denial of execution.
- 73. Application to Registrar where Sub-Registrar refuses to re-
- 74. Procedure of Registrar on such
- 75. Order by Registrar to register,
- 76. Order of refusal by Registrar.
- 77. Suit in case of order of refusal by Registrar.

#### PART XIII.

- OF THE FEES FOR REGISTRATION, SEARCHES, AND COPIES.
- Fees to be fixed by Local Government.
- 79. Publication of fees.
- 80. Fees payable on presentation.

# PART XIV.

#### OF PENALTIES.

- Penalty for incorrectly endorsing, copying, translating or registering documents with intent to injure.
- Penalty for making false statements, delivering false copies or translations, false personation, and abetment.
- 83. Registering officers may commence prosecutions.
- Registering officers to be deemed public servants.

#### PART XV.

#### Miscellaneous.

#### SECTION.

- 85. Destruction of unclaimed documents.
- 86. Registering officer not liable for thing bond fide done or refused in his official capacity,

87. Nothing so done invalidated by defect in appointment or procedure.

88. Registration of documents executed by Government officers or certain public functionaries.

89. Copies of certain orders, certificates, and instruments to be sent to registering officers, and filed. 

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#### Exemptions from Act.

#### ON. SECTION.

- go. Exemption of certain documents executed by or in favour of Government.
- gr. Inspection and copies of such documents.
- 92. Burmese registration rules confirmed.

# Repeals.

93. Repeals. est submedien de Contool de Co

THE SCHEDULE-REPEAL OF ENACTMENTS.

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# THE INDIAN REGISTRATION ACT, 1908. ACT NO. XVI. OF 1908.

Passed by the Governor-General of India in Council.

[Received His Excellency's Assent on the 18th December, 1908.]

An Act to consolidate the Enactments relating to the Registration of Documents.

WHEREAS it is expedient to consolidate the enactments relating to the registration of documents; It is hereby enacted as follows:—

# PART I.

# PRELIMINARY.

Short title, extent, and commencement.

1. (1) This Act may be called the Indian Registration Act, 1908.

(a) It extends to the whole of British India except such districts or tracts of country as the Local Government may, with the previous sanction of the Governor-General in Council, exclude from its operation.

(3) It shall come into force on the first day of January, 1909.

Definitions.

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2. In this Act, unless there is anything repugnant in the subject or context,—

- (1) "addition" means the place of residence, and the profession, trade, rank, and title (if any) of a person described, and, in the case of a Native of India, his caste (if any) and his father's name, or, where he is usually described as the son of his mother, then his mother's name:
- (2) "book" includes a portion of a book and also any number of sheets connected together with a view of forming a book or portion of a book:
- (3) "district" and "sub-district," respectively, mean a district and sub-district formed under this Act:
- (4) "District Court" includes the High Court in its ordinary original civil jurisdiction:

- (5) "endorsement" and "endorsed" include and apply to an entry in writing by a registering officer on a rider or covering slip to any document tendered for registration under this Act:
- (6) "immoveable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries, or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops, nor grass:
- (7) "lease" includes a counterpart, kabuliat, an undertaking to cultivate or occupy, and an agreement to lease:
- (8) "minor" means a person who, according to the personal law to which he is subject, has not attained majority:
- (9) "moveable property" includes standing timber, growing crops, and grass, fruit upon, and juice in trees, and property of every other description except immoveable property: and
- (10) "representative" in cludes the guardian of a minor and the committee or other legal curator of a lunatic or idiot.

## PART II.

# OF THE REGISTRATION-ESTABLISHMENT.

8. (1) The Local Government shall appoint an officer to be Inspector-General of Restriction. In the Inspector-General of Registration for the territories subject to such Government:

Provided that the Local Government may instead of making such appointment, direct that all or any of the powers and duties hereinafter conferred and imposed upon the Inspector-General shall be exercised and performed by such officer or officers, and within such local limits, as the Local Government appoints in this behalf.

- (2) Any Inspector-General may h old simultaneously any other office under Government.
- 4. (1) The Governor of Bombay in Council may also with Branch Inspector-General the previous consent of the Governor-of Sindh. General in Council, appoint an officer to be Branch Inspector-General of Sindh, who shall have all the powers of an inspector-General under this Act other than the power to frame rules hereinafter conferred.

- (2) The Branch Inspector-General of Sindh may hold simultaneously any other office under Government.
  - 5. (1) For the purposes of this Act, the Local Government shall form districts and sub-districts, and shall prescribe and may alter the limits of such districts and sub-districts.
- (2) The districts and sub-districts formed under this section, together with the limits thereof, and every alteration of such limits, shall be notified in the local official gazette.
- (3) Every such alteration shall take effect on such day after the date of the notification as is herein mentioned.
- 6. The Local Government may appoint such persons, whether Registrars and Sub-Regis- public officers or not, as it thinks proper, to be Registrars of the several districts, and to be Sub-Registrars of the several sub-districts, formed as aforesaid, respectively:
- \* Provided that Local Government may delegate, subject to such restrictions and conditions as it thinks fit, to the Inspector-General of Registration the power of appointing Sub-Registrars.
- 7. (r) The Local Government shall establish in every district Offices of Registrar and an office to be styled the office of the Sub-Registrar. Registrar, and in every sub-district an office or offices to be styled the office of the Sub-Registrar or the offices of the Joint Sub-Registrars.
- (2) The Local Government may amalgamate with any office of a Registrar any office of a Sub-Registrar subordinate to such Registrar, and may authorize any Sub-Registrar whose office has been so amalgamated to exercise and perform, in addition to his own powers and duties, all or any of the powers and duties of the Registrar to whom he is subordinate:

Provided that no such authorisation shall enable a Sub-Registrar to hear an appeal against an order passed by himself under this Act.

8. (1) The Local Government may also appoint officers to be taspectors of Registration-offices, and may prescribe the duties of such officers.

<sup>\*</sup> The proviso to s. 6 has been added by Act IV. of 1914.



- (2) Every such Inspector shall be subordinate to the Inspector-General.
- 2. Every military cantonment may (if the Local Government Mulitary cantonments may so directs) be, for the purposes of this be declared sub-districts or Act, a sub-district or a district and the districts.

  Cantonment Magistrate shall be the Sub-Registrar or the Registrar of such sub-district or district, as the case may be.
- Absence of Registrar or district including a Presidency-town, is vacancy in his office. absent otherwise than on duty in his district, or when his office is temporarily vacant any person whom the Inspector-General appoints in this behalf, or, in default of such appointment, the Judge of the District Court, within the local limits of whose jurisdiction the Registrar's office is situate, shall be the Registrar during such absence, or until the Local Government fills up the vacancy.
- (2) When the Registrar of a district including a Presidency-town is absent otherwise than on duty in his district, or when his office is temporarily vacant, any person whom the Inspector-General appoints in this behalf shall be the Registrar during such absence, or until the Local Government fills up the vacancy.
- 11. When any Registrar is absent from his office on duty in

  Absence of Registrar on his district, he may appoint any Subduty in his district.

  Registrar or other person in his district to perform, during such absence, all the duties of a Registrar except those mentioned in sections 68 and 72.
- 12. When any Sub-Registrar is absent, or when his office
  Absence of Sub-Registrar is temporarily vacant, any person whom
  or vacancy in his office the Registrar of the district appoints in
  this behalf shall be Sub-Registrar during such absence, or until "the
  vacancy is filled up."\*
  - 18. (1) "All appointments made by the Inspector-General under section 6 and "† all appointments ments and suspension and removal and dismissal of officers.

    18. (1) "All appointments made by the Inspector-General under section 6 and "† all appointments made under section 10, section 11, or section 12 shall be reported to the Local Government by the Inspector-General.

<sup>\*</sup> Words quoted were substituted by Act IV. of 1914.

<sup>†</sup> Words quoted were added by Act IV, of 1914.

- (2) Such report shall be either special or general as the Local Government directs.
- (3) The Local Government may suspend, remove, or dismiss any person appointed under the provisions of this Act, and appoint another person in his stead, "and the Inspector-General of Registration may subject to the conditions and restrictions as the Local Government may impose, exercise the like power in the case of Sub-Registrars appointed by him."\*
- 14. (1) Subject to the controlf of the Governor-General in Remuneration and establishments of registering assign such salaries is such Government deems proper to the registering officers appointed under this Act, or provide for their remuneration by fees, or partly by fees, and partly by salaries.
- (2) The Local Government may allow proper establishments for the several offices under this Act.
- 15. The several Registrars and Sub-Registrars shall use a Seal of registering officers, Seal bearing the following inscription in English, and in such other language as the Local Government directs: "The seal of the Registrar (or Sub-registrar) of
- 16. (1) The Local Government shall provide for the office of Register books and fire-proof boxes. Government shall provide for the office of every registering officer the books necessary for the purposes of this Act.
- (2) The books so provided shall contain the forms from time to time prescribed by the Inspector-General, with the sanction of the Local Government, and the pages of such books shall be consecutively numbered in print, and the number of pages in each book shall be certified on the title-page by the officer by whom such books are issued.
- (3) The Local Government shall supply the office of every Registrar with a fire-proof box and shall, in each district, make suitable provision for the safe custody of the records connected with the registration of documents in such district.



<sup>\*</sup> Words quoted were added by Act IV. of 1914.

<sup>†</sup> Substituted for the word "approval" by Act IV. of 1914.

## PART III.

# OF REGISTRABLE DOCUMENTS.

- 17. (r) The following documents shall be registered, if the Documents of which regisproperty to which they relate is situate tration is compulsory. in a district in which, and if they have been executed on or after the date on which Act No XVI. of 1864 or the Indian Registration Act, 1866,\* or the Indian Registration Act, 1877,‡ or this Act came or comes into force, namely—
- (a) instruments of gift of immoveable property;
  - (b) other non-testamentary instruments which purport or operate to create, declare assign, limit, or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of the value of one hundred rupees and upward, to or in immoveable property;
  - (c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation, or extinction of any such right, title, or interest; and
  - (d) leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent:

Provided that the Local Government may, by order published in the local official gazette, exempt from the operation of this subsection any leases executed in any district or part of a district, the terms granted by which do not exceed five years, and the annual rents reserved by which do not exceed fifty rupees.

- (2) Nothing in clauses (b) and (c) of sub-section (1) applies to—
  - (i) any composition-deed; or
- (ii) any instrument relating to shares in a Joint Stock Company, notwithstanding that the assets of such Company consist, in whole or in part, of immoveable property; or
  - (iii) any debenture issued by any such Company, and not creating, declaring, assigning, limiting, or extinguish-

<sup>\*</sup> Act XX. of 1866.

<sup>+</sup> Act VII. of 1871.

ing any right, fitle, or interest to or in immoveable property except in so far as it entitles the holder to the security afforded by a registered instrument, whereby the Company has mortgaged, conveyed, or otherwise transferred the whole or part of its immoveable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

- (iv) any endorsement upon, or transfer of, any debenture issued by any such Company; or
- (v) any document not itself creating, declaring, assigning, limiting, or extinguishing any right, title, or interest of the value of one hundred rupees and upwards to or in immoveable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit, or extinguish any such right, title, or interest; or
  - (vi) any decree or order of a Court, and any award; or
  - (vii) any grant of immoveable property by Government; or
  - (viii) any instrument of partition made by a Revenue-officer; or
    - (ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871,\* or the Land Improvement Loans Act, 1883;†
      or
  - (x) any order granting a loan under the Agriculturists' Loans Act, 1884,‡ or instrument for securing the repayment of a loan made under that Act; or
  - (xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or
  - (xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue Officer.

† Act XIX. of 1883.



<sup>\*</sup> Act XXVI. of 1871. † Act XII. of 1884.

(3) Authorities to adopt a son, executed after the first day of January 1872, and not conferred by a will, shall also be registered.

Documents of which registration is optional.

18. Any of the following documents may be registered under this Act, namely—

- (a) instruments (other than instruments of gift and wills)
  which purport or operate to create. declare, assign,
  limit, or extinguish, whether in present or in future,
  any right, title, or interest, whether vested or contingent, of a value less than one hundred rupees, to or
  in immoveable property;
- (b) instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation, or extinction of any such right, title, or interest;
- (e) leases of immoveable property for any term not exceeding one year, and leases exempted under section 17;
- (d) instruments (other than wills), which purport or operate to create, declare, assign, limit, or extinguish any right, title, or interest to or in moveable property;
- (e) wills; and
- (f) all other documents not required by section 17 to be registered.
- 19. If any document duly presented for registration be in a Documents in language language which the registering officer act understood by registering does not understand, and which is not commonly used in the district, he shall refuse to register the document, unless it be accompanied by a true translation into a language commonly used in the district, and also by a true copy.
- 20. (r) The registering officer may, in his discretion, refuse

  Documents containing in to accept for registration any document
  terlineations, blanks, erain which any interlineation blank, erasure,
  or alteration appears unless the persons
  executing the document attest with their signatures or initials such
  interlineation, blank, erasure, or alteration.
- (2) If the registering officer registers any such document, he shall, at the time of registering the same, make a note in the register of such interlineation, blank, erasure, or alteration.

- 21. (r) No non-testamentary document relating to immoveable.

  Description of property property shall be accepted for registration and maps or plans.

  unless it contains a description of such property sufficient to identify the same.
- (2) Houses in towns shall be described as situate on the north on other side of the street or road (which should be specified) to which they front, and by their existing and former occupancies, and by their numbers if the houses in such street or road are numbered.
- (3) Other houses and lands shall be described by their name, if any, and as being in the territorial division in which they are situate, and by their superficial contents, the roads and other properties on which they abut, and their existing occupancies, and also, whenever it is practicable, by reference to a Government map or survey.
- (4) No non-testamentary document containing a map or plan of any property comprised therein shall be accepted for registration unless it is accompanied by a true copy of the map or plan, or, in case such property is situate in several districts, by such number of true copies of the map or plan as are equal to the number of such districts.
- 22. (r) Where it is, in the opinion of the Local Government,
  Description of houses and land by reference to Government maps or surveys.

  Local Government may, by rule made under this Act, require that such houses and land as aforesaid shall, for the purposes of section 21, be so described.
- (2) Save as otherwise provided by any rule made under subsection (1), failure to comply with the provisions of section 21, sub-section (2) or sub-section (3), shall not disentitle a document to be registered if the description of the property to which it relates is sufficient to identify that property.

# PART IV.

# OF THE TIME OF PRESENTATION.

23. Subject to the provisions contained in sections 24, 25, and Time for presenting docu- 26, no document other than a will shall ments. be accepted for registration unless



presented for that purpose to the proper officer within four months from the date of its execution:

Provided that a copy of a decree or order may be presented within four months from the date on which the decree or order was made, or, where it is appealable, within four months from the day on which it becomes final.

Documents executed by several persons at different

24. Where there are several persons executing a document at different times, such document may be presented for registration and re-registration within four months from the date of each execution.

- 25. (1) If, owing to urgent necessity or unavoidable accident, Provision where delay in any document executed, or copy of a decree or order made, in British India, presentation is unavoidable. is not presented for registration till after the expiration of the time hereinbefore prescribed in that behalf, the Registrar, in cases where the delay in presentation does not exceed four months, may direct that, on payment of a fine not exceeding ten times the amount of the proper registration-fee, such document shall be accepted for registration.
- (2) Any application for such direction may be lodged with a Sub-Registrar, who shall forthwith forward it to the Registrar to whom he is subordinate.
- 26. When a document purporting to have been executed by Documents executed out all or any of the parties out of British of British India. India is not presented for registration till after the expiration of the time hereinbefore prescribed in that behalf, the registering officer, if satisfied.-
  - (a) that the instrument was so executed, and
  - (b) that it has been presented for registration within four months after its arrival in British India,

may, on payment of the proper registration-fee, accept such document for registration.

Wills may be presented or deposited at any time.

27. A will may at any time be presented for registration or deposited in manner hereinafter provided.

# PART V.

# OF THE PLACE OF REGISTRATION.

- 28. Save as in this Part otherwise provided, every document Place for registering documentioned in section 17, sub-section (r), clauses (a), (b), (c), and (d), and section 18, clauses (a), (b), and (c), shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate.
- 29. (1) Every document other than a document referred to in Place for registering other section 28, and a copy of a decree or documents. Order, may be presented for registration, either in the office of the Sub-Registrar in whose sub-district the document was executed, or in the office of any other Sub-Registrar under the Local Government at which all the persons executing and claiming under the document desire the same to be registered.
- (2) A copy of a decree or order may be presented for registration in the office of the Sub-Registrar in whose sub-district the original decree or order was made, or, where the decree or order does not affect immoveable property, in the office of any other Sub-Registrar under the Local Government at which all the persons claiming under the decree or order desire the copy to be registered.
- 80. (1) Any Registrar may, in his discretion, receive and Registration by registrars register any document which might be in certain cases.

  registered by any Sub-Registrar subordinate to him.
- (2) The Registrar of a district including a Presidency-town, and the Registrar of the Lahore District may receive and register any document referred to in section 28 without regard to the situation in any part of British India of the property to which the document relates.
- Registration or acceptance for deposit at private residence.

  Registration or acceptance for deposit at private residence.

  Registration or acceptance office of the officer authorized to accept the same for registration or deposit:

Provided that such officer may, on special cause being shown, attend at the residence of any person desiring to present a document for registration or to deposit a will, and accept for registration or deposit such document or will.

#### PART VI.

# OF PRESENTING DOCUMENTS FOR REGISTRATION.

- 32. Except in the cases mentioned in section 31 and section Persons to present docu- 89, every document to be registered ments for registration. under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office—
  - (a) by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order, or
  - (b) by the representative or assign of such person, or
  - (c) by the agent of such person, representative, or assign, duly authorized by power-of-attorney executed and authenticated in manner hereinafter mentioned.

Powers-of-attorney recognizable for purpose of section 32, the following powers-of-attorney shall alone be recognized namely—

- (a) if the principal, at the time of executing the power-of attorney, resides in any part of British India in which this Act is for the time being in force, a power-ofattorney executed before, and authenticated by, the Registrar or Sub-Registrar within whose district or sub-district the principal resides;
- (b) if the principal, at the time aforesaid, resides in any other part of British India, a power-of-attorney executed before, and authenticated by, any Magistrate;
- (c) if the principal, at the time aforesaid, does not reside in British India, a power-of-attorney executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, British Consul, or Vice-Consul, or representative of His Majesty, or of the Government of India;

Provided that the following persons shall not be required to attend at any registration-office or Court for the purpose of executing any such power-of-attorney as is mentioned in clauses |(a) and (b) of this section, namely—

 (i) persons who, by reason of bodily infirmity, are unable, without risk or serious inconvenience, so to attend;

- (ii) persons who are in jail under civil or criminal process;
- (iii) persons exempt by law from personal appearance in Court.
- (2) In the case of every such person, the Registrar or Sub-Registrar or Magistrate, as the case may be, if satisfied that the power-of-attorney has been voluntarily executed by the person purporting to be the principal, may attest the same without requiring his personal attendance at the office or Court aforesaid.
- (3) To obtain evidence as to the voluntary nature of the execution, the Registrar or Sub-Registrar or Magistrate may either himself go to the house of the person purporting to be the principal, or to the jail in which he is confined, and examine him, or issue a commission for his examination.
- (4) Any power-of-attorney mentioned in this section may be proved by the production of it without further proof when it purports on the face of it to have been executed before, and authenticated by, the person or Court hereinbefore mentioned in that behalf.
- 84. (1) Subject to the provisions contained in this Part, and Enquiry before registration in sections 41, 43, 45, 69, 75, 77, 88 and by registering officer.

  89, no document shall be registered under this Act unless the persons executing such document or their representatives, assings, or agents authorized as aforesaid appear before the registering officer within the time allowed for presentation under sections 23, 24, 25, and 26:

Provided that, if, owing to urgent necessity of unavoidable accident, all such persons do not so appear, the Registrar, in cases where the delay in appearing does not so exceed four months may direct that, on payment of a fine not exceeding ten times the amount of the proper registration-fee, in addition to the fine, if any, payable under section 25, the document may be registered.

- (2) Appearance under sub-section (1) may be simultaneous or at different times.
  - (3) The registering officer shall thereupon-
  - (a) enquire whether or not such document was executed by the persons by whom it purports to have been executed;
    - (b) satisfy himself as to the identity of the persons appearing before him, and alleging that they have executed the document; and,

Act XVI., 1908.-2.

- (c) in the case of any person appearing as a repesentative, assign, or agent, satisfy himself of the right of such person so to appear.
- (4) Any application for a direction under the proviso to sub-section (1) may be lodged with a Sub-Registrar, who shall forthwith forward it to the Registrar to whom he is subordinate.
- (5) Nothing in this section applies to copies of decrees or orders.
- 85. (1) (a) If all the persons executing the document appear

  Procedure on admission personally before the registering officer, and denial of execution, read are personally known to him, or if spectively. he be otherwise satisfied that they are the persons they represent themselves to be, and if they all admit the execution of the document, or
- $(\delta)$  if, in the case of any person appearing by a representative, assign, or agent, such representative, assign, or agent admits the execution, or
- (c) if the person executing the document is dead, and his representative or assign appears before the registering officer, and admits the execution,

the registering officer shall register the document as directed in sections 58 to 61, inclusive.

- (2) The registering officer may, in order to satisfy himself that the persons appearing before him are the persons they represent themselves to be, or for any other purpose contemplated by this Act, examine any one present in his office.
- (3) (a) If any person by whom the document purports to be executed denies its execution, or
- ( $\delta$ ) if any such person appears to the registering officer to be a minor, an idiot, or a lunatic, or
- (c) if any person by whom the document purports to be executed is dead, and his representative or assign denies its execution,

the registering officer shall refuse to register the document as to the person so denying, appearing, or dead:

Provided that, where such officer is a Registrar, he shall follow the procedure prescribed in Part XII.

COLUMN TO A

#### PART VII.

OF ENFORCING THE APPEARNCE OF EXECUTANTS AND WITNESSES.

Procedure where appearance of executant or witness is desired.

Or claiming under any document, which is capable of being so presented, desires the appearance of any person whose presence or testimony is necessary for the registration of such document, the registering officer may, in his discretion, call upon such officer or Court as the Local Government directs in this behalf to issue a summons requiring him to appear at the registration-office, either in person, or by duly authorized agent, as in the summons may be mentioned, and at a time named therein.

87. The officer or Court, upon receipt of the peon's fee Officer or Court to issue and cause service of summons. Summons accordingly and cause it to be served upon the person whose appearance is so required.

Persons exempt from appearance at registration office. 33. (1) (a) A person who by reason of bodily infirmity, is unable, without risk or serious inconvenience, to appear at the registration-office, or

 $(\delta)$  a person in jail under civil or criminal process, or

(c) persons exempt by law from personal appearance in Court, and who would, but for the provision next hereinafter contained, be required to appear in person at the registration-office,

shall not be required so to appear.

- (2) In the case of every such person, the registering officer shall either himself go to the house of such person, or to the jail in which he is confined, and examine him or issue a commission for his examination.
- 39. The law in force for the time being as to summonses, Law as to summonses, commissions, and compelling the attencommissions, and witnesses. dance of witnesses, and for their remuneration in suits before Civil Courts, shall, save as aforesaid, and mutatis mutandis, apply to any summons or commission issued, and any person summoned to appear, under the provisions of this Act.

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#### PART VIII.

#### OF PRESENTING WILLS AND AUTHORITIES TO ADOPT.

- 40. (r) The testator, or, after his death, any person claiming

  Persons entitled to present as executor or otherwise under a will

  may present it to any Registrar or SubRegistrar for registration.
- (a) The donor or, after his death, the donee of any authority to adopt, or the adoptive son, may present it to any Registrar or Sub-Registrar for registration.
- **41.** (r) A will or an authority to adopt presented for regis-Registration of wills and tration by the testator or donor may be registered in the same manner as any other document.
- (2) A will or authority to adopt presented for registration by any other person entitled to present it shall be registered if the registering officer is satisfied—
  - (a) that the will or authority was executed by the testator or donor, as the case may be;
  - (b) that the testator or donor is dead; and
  - (c) that the person presenting the will or authority is, under section 40, entitled to present the same.

# PART IX.

# OF THE DEPOSIT OF WILLS.

- Deposit of Wills.

  Deposit of the testator, and that of his agent (if any), and with a statement of the nature of the document.
- 43. (1) On receiving such cover, the Registrar if satisfied,
  Procedure on deposit of that the person presenting the same for
  wills. deposit is the testator or his agent, shall
  transcribe in his Resister-book No. 5 the superscription aforesaid,
  and shall note in the same book, and no the said cover, the year,
  month, day, and hour of such presentation and receipt, and the
  names of any persons who may testify to the identity of the testator

or his agent, and any legible inscription which may be on the seal of the cover.

- (2) The Registrar shall then place and retain the sealed cover in his fire-proof box.
- 44. If the testator, who has deposited such cover, wishes Withdrawl of sealed cover to withdraw it, he may apply, either deposited under section 42. personally or by duly-authorized agent, to the Registrar who holds it in deposit, and such Registrar, if satisfied that the applicant is actually the testator or his agent, shall deliver the cover accordingly.
- Proceedings on death of sealed cover under section 42, applidepositor. cation be made to the Registrar who holds it in deposit to open the same, and, if the Registrar is satisfied that the testator is dead, he shall, in the applicant's presence, open the cover, and, at the applicant's expense, cause the contents thereof to be copied into his book No. 3.
- (2) When such copy has been made, the Registrar shall redeposit the original will.
- 46. (1) Nothing hereinbefore contained shall affect the pro-Saving of certain enact- visions of section 259 of the Indian Sucments and powers of Courts- cession Act, 1865,\* or of section 81 of the Probate and Administration Act, 1881,† or the power of any Court by order to compel the production of any will.
- (2) When any such order is made, the Registrar shall, unless the will has been already copied under section 45, open the cover, and cause the will to be copied into his Book No. 3, and make a note on such copy that the original has been removed into Court in pursuance of the order aforesaid.

# PART X.

OF THE EFFECTS OF REGISTRATION AND NON-REGISTRATION.

47. A registered document shall operate from the time from Time from which register- which it would have commenced to ed document operates. operate if no registration thereof had been required or made, and not from the time of its registration.

<sup>\*</sup> Act X. of 1865.

48. All non-testamentary documents duly registered under
Registered documents rethis Act, and relating to any property,
lating to property when to whether moveable or immoveable, shall take effect against oral take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession.

effect of non-registration of documents required to be registered.

49. No document required by section 17 to be registered shall—

- (a) affect any immoveable property comprised therein, or
- (b) confer any power to adopt, or
- (c) be received as evidence of any transaction affecting such property, or conferring such power,

unless it has been registered.

- Certain registered documents of the kinds mentioned in clause

  Certain registered documents (a), (b), (c), and (d) of section 17, subments relating to land to section (1), and clauses (a) and (b) of take effect against unregistered documents, effect, as regards the property comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.
- (2) Nothing in sub-section (7) applies to leases exempted under the proviso to sub-section (7) of section 17, or to any document mentioned in sub-section (2) of the same section, or to any registered document which had not priority under the law in force at the commencement of this Act.

Explanation.—In cases where Act No. XVI. of 1864 or the Indian Registration Act, 1866,\* was in force in the place, and at the time, in and at which such unregistered document was executed, "unregistered" means not registered according to such Act, and, where the document is executed after the first day of July 1871, not registered under the Indian Registration Act, 1871,† or the Indian Registration Act, 1877,‡ or this Act.

#### PART XI.

# OF THE DUTIES AND POWERS OF REGISTERING OFFICERS.

(A)—As to the Register-books and Indexes.

Register-books to be kept in the several offices.

51. (1) The following books shall be kept in the several offices hereinafter named, namely:—

A-In all registration offices-

Book 1—"Register of Non-testamentary Documents relating to Immoveable Property;"

Book 2-" Record of Reasons for Refusal to register;"

Book 3-"Register of Wills and Authorities to adopt;" and

Book 4-" Miscellaneous Register:"

B.—In the offices of Registrars—

Book 5-" Register of Deposits of Wills."

- (2) In book I shall be entered or filed all documents or memoranda registered under sections 17, 18, and 89, which relate to immoveable property, and are not wills.
- (3) In Book 4 shall be entered all documents registered under clauses (d) and (f) of section 81 which do not relate to immoveable property.
- (4) Nothing in this section shall be deemed to require more than one set of books where the office of the Registrar has been amalgamated with the office of a Sub-Registrar.
- 52. (1) (a) The day, hour, and place of presentation, and

  Duties of registering of the signature of every person presenting a document for registration, shall be endorsed on every such document at the time of presenting it;
- •• (b) a receipt for such document shall be given by the registering officers to the person presenting the same; and,
- (c) subject to the provisions contained in section 62, every document admitted to registration shall, without unnecessary delay, be copied in the book appropriated therefor according to the order of its admission.
- (2) All such books shall be authenticated at such intervals and in such manner as is from time to time prescribed by the Inspector-General.

- 53. All entries in each book shall be numbered in a conse-Entries to be numbered cutive series which shall commence and consecutively. terminate with the year, a fresh series being commenced at the beginning of each year.
- 54. In every office in which any of the books hereinbefore

  Current indexes and enmentioned are kept, there shall be pretries therein. pared current indexes of the contents
  of such books; and every entry in such indexes shall be made, so
  far as practicable, immediately after the registering officer has
  copied or filed a memorandum of, the document to which it relates.
- 55. (1) For such indexes shall be made in all regisladexes to be made by tration-offices, and shall be named, registering officers, and their contents.

  The property of tration-offices and shall be named, respectively, Index No. I., Index No. III., Index No. III., and Index No. IV.
- (2) Index No. I. shall contain the names and additions of all persons executing, and of all persons claiming under, every document entered or memorandum filed in Book No. 1.
- (3) Index No. II, shall contain such particulars mentioned in section 21 relating to every such document and memorandum as the Inspector-General from time to time directs in that behalf.
- (4) Index No. III. shall contain the names and additions of all persons executing every will and authority entered in Book No. 3 and the executors and persons respectively appointed thereunder, and, after the death of the testator or the donor (but not before), the names and additions of all persons claiming under the same.
- (5) Index No. IV. shall contain the names and additions of all persons executing, and of all persons claiming under, every document entered in Book No. 4.
- (6) Each. Index shall contain such other particulars, and shall be prepared in such form, as the Inspector-General from time to time directs.
- Copy of entries in Indexes whom he is subordinate, at such interNos. I., II., and III., to be vals as the Inspector-General from time sent by Sub-Registrar to to time directs, a copy of all entries made by such Sub-Registrar, during the last of such intervals, in Indexes Nos. I., II., and III.

- (2) Every Registrar receiving such copy shall file it in his office.
- Registering officers to allow inspection of certain and the Indexes relating to Book No. I and 2 and the Indexes relating to Book No. I and the Indexes relating to Book No. I shall be at all times open to inspection by any person applying to inspect the same; and, subject to the provisions of section 62, copies of entries in such books shall be given to all persons applying for such copies.
- (2) Subject to the same provisions, copies of entries in Book No. 3 and in the Index relating thereto shall be given to the persons executing the documents to which such entries relate, or to their agents, and, after the death of the executants (but not before), to any person applying for such copies.
- (3) Subject to the same provisions, copies of entries in Book No. 4, and in the Index relating thereto, shall be given to any person executing or claiming under the documents to which such entries respectively refer, or to his agent or representative.
- (4) The requisite search under this section for entries in Books Nos. 3 and 4 shall be made only by the registering officer.
- (5) All copies given under this section shall be signed and sealed by the registering officer, and shall be admissible for the purpose of proving the contents of the original documents.

# (B)—As to the Procedure on admitting to Registration.

- 53. (1) On every document admitted to registration, other

  Particulars to be endorsed on documents admitted to copy sent to a registering officer under section 89, there shall be endorsed from time to time the following particulars, namely—
  - (a) the signature and addition of every person admitting the execution of the document, and, if such execution has been admitted by the representative, assign, or agent of any person, the signature and addition of such representative, assign, or agent;
  - (δ) the signature and addition of every person examined in reference to such document under any of the provisions of this Act; and

- (c) any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document, and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution.
- (2) If any person admitting the execution of a document refuses to endorse the same the registering officer shall nevertheless register it, but shall at the same time endorse a note of such refusal.
- Endorsements to be dated and signed by registering officer shall affix the date and his signature to all endorsements made under sections and signed by registering officer.

  52 and 58 relating to the same document and made in his presence on the same day.
- 60. (1) After such of the provisions of sections 34, 35, 58, and 59 as apply to any document presented for registration have been complied with, the registering officer shall endorse thereon a certificate containing the word "registered," together with the number and page of the book in which the document has been copied.
- (2) Such certificate shall be signed, sealed, and dated by the registering officer, and shall then be admissible for the purpose of proving that the document has been duly registered in manner provided by this Act, and that the facts mentioned in the endorsements referred to in section 59 have occurred as therein mentioned.
- 61 (1) The endorsements and certificate referred to and Endorsements and certificate mentioned in sections 59 and 60 shall cate to be copied, and document returned.

  The endorsements and certificate referred to and endorsements and certificate referred to and the copy of shall thereupon be copied in to the margin of the Register-book, and the copy of the map or plan (if any) mentioned in section 21 shall be filed in Book No. 1.
- (2) The registration of the document shall thereupon be deemed complete, and the document shall then be returned to the person who presented the same for registration, or to such other person (if any) as he has nominated in writing in that behalf on the receipt mentioned in section 52.
- Procedure on presenting section 19, the translation shall be translation to language unscribed in the register of documents of the nature of the original, and together with the copy referred to in section 19, shall be filed in the registration-office.

(2) The endorsements and certificate respectively mentioned in sections 59 and 60 shall be made in the original, and, for the purpose of making the copies and memoranda required by sections 57, 64, 65, and 66, the translation shall be treated as if it were the original.

Power to administer oaths and record of substance of statements.

- 63. (r) Every registering officer may at his discretion administer an oath to any person examined by him under the provisions of this Act.
- (2) Every such officer may also at his discretion record a note of the substance of the statement made by each such person, and such statement shall be read over, or (if made in a language with which such person is not acquainted) interpreted to him in a language with which he is acquainted, and, if he admits the correctness of such note, it shall be signed by the registering officer.
- (3) Every such note signed shall be admissible for the purpose of proving that the statements therein recorded were made by the persons and under the circumstances therein stated.

# (C)—Special Duties of Sub-Registrar.

- Procedure where the document relating to immoveable proment relates to land in seveperty not wholly situate in his own subral sub-districts. district, shall make a memorandum
  thereof, and of the endorsement and certificate (if any) thereon,
  and send the same to every other Sub-Registrar subordinate to
  the same Registrar as himself in whose sub-district any part of
  such property is situate, and such Sub-Registrar shall file the memorandum in his Book No. 1.
- Procedure where document relates to land in several districts.

  Procedure where document relates to land in seveproperty situate in more districts than
  one shall also forward a copy thereof and
  of the endorsement and certificate (if any) thereon, together with
  a copy of the map or plan (if any) mentioned in section 21, to the
  Registrar of every district in which any part of such property
  is situate other than the district in which his pin sub-district is
  situate.
- (2) The Registrar, on receiving the sam, the lift lie in his Book.

  No. I the copy of the document and the copy is the map or plan (if any), and shall forward a memorandum of the cument to each

of the Sub-Registrars subordinate to him within whose sub-district any part of such property is situate: and every Sub-Registrar receiving such memorandum shall file it in his Book No. 1.

# (D)-Special Duties of Registrar.

- 66. (1) On registering any non-testamentary document reProcedure after registra- lating to immoveable property, the Registion of documents relating transhall forward a memorandum of
  such document to each Sub-Registrar
  aubordinate to himself in whose sub-district any part of the property is situate.
- (2) The Registrar shall also forward a copy of such documenttogether with a copy of the map or plan (if any) mentioned in section 21, to every other Registrar in whose district any part of such property is situate.
- (3) Such Registrar, on receiving any such copy, shall file it in his Book No. 1, and shall also send a memorandum of the copy to each of the Sub-Registrars subordinate to him within whose sub-district any part of the property is situate.
- (4) Every Sub-Registrar, receiving any memorandum under this section, shall file it in his Book No. 1.
- 67. On any document being registered under section 30, subProcedure after registra- section (2), a copy of such document,
  tion under section 30, Sub- and of the endorsements and certificate
  section (2). thereon, shall be forwarded to every
  Registrar within whose district any part of the property to which
  the instrument relates is situate, and the Registrar receiving such
  copy shall follow the procedure prescribed for him in section
  66, sub-section (1).

# (E)—Of the Controlling Powers of Registrars and Inspectors-General.

- 68. (1) Every Sub-Registrar shall perform the duties of his Power of Registrar to office under the superintendence and superintend and control Sub-control of the Registrar in whose district the office of such Sub-Registrar is situate.
- (2) Every Registrar shall have authority to issue (whether on complaint or otherwise) any order consistent with this Act which he considers necessary in respect of any act or omission of any Sub-Registrar subordinate to him, or in respect of the rectification

of any error regarding the book or the office in which any document has been registered.

- Power of Inspector General shall exercise a general superpower of Inspector General to superintend registration-offices and make rules.

  to time to make rules consistent with this Act—
  - (a) providing for the safe custody of books, papers, and documents, and also for the destruction of such books, papers and documents as need no longer be kept;
  - (b) declaring what languages shall be deemed to be commonly used in each district;
  - (c) declaring what territorial divisions shall be recognized under section 21;
  - (d) regulating the amount of fines imposed under sections 25 and 34, respectively;
  - (e) regulating the exercise of the discretion reposed in the registering-officer by section 63;
  - (f) regulating the form in which registering-officers are to make memoranda of documents;
  - (g) regulating the authentication by Registrars and Sub-Registrars of the books kept in their respective offices under section 51;
  - (h) declaring the particulars to be contained in Indexes Nos. I., II., III., and IV., respectively;
  - (r) declaring the holidays that shall be observed in the registration offices; and,
  - (j) generally, regulating the proceedings of the Registrars and Sub-Registrars.
- (2) The rules so made shall be submitted to the Local Government for approval, and, after they have been approved, they shall be published in the official gazette, and on publication, shall have effect as if enacted in this Act.
- 70. The Inspector-General may also, in the exercise of his Power of Inspector-Genediscretion, remit, wholly or in part, the difference between any fine levied under section 25 or section 34 and the amount of the proper registration-fee.

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#### PART XII.

#### OF REFUSAL TO REGISTER.

- 71. (1) Every Sub-Registrar refusing to register a document,
  Reasons for refusal to re- except on the ground that the property to
  gister to be recorded. which it relates is not situate within his
  sub-district, shall make an order of refusal, and record his reasons
  for such order in his Book No. 2 and endorse the word "registration refused" on the document; and, on application made by any
  person executing or claiming under the document, shall without
  payment and unnecessary delay, give him a copy of the reasons so
  recorded.
- (2) No registering officer shall accept for registration a document so endorsed unless and until, under the provisions hereinafter contained, the document is directed to be registered.

Appeal to Register from orders of Sub-Registrar refusing registration on ground other than denial of execution.

Appeal to Register from of denial of execution, an appeal shall lie against an order of a Sub-Registrar refusing registration on ground other than denial of exe(whether the registration of such document is compulsory or optional) to the

Registrar to whom such Sub-Registrar is subordinate if presented to such Registrar within thirty days from the date of the order; and the Registrar may reverse or alter such order.

- (2) If the order of the Registrar directs the document to be registered, and the document is duly presented for registration within thirty days after making of such order, the Sub-Registrar shall obey the same, and thereupon shall, so far as may be practicable, follow the procedure prescribed in sections 58, 59, and 60; and such registration shall take effect as if the document had been registered when it was first duly presented for registration.
- Application to Registrar ment on the ground that any person by where Sub-Registrar refuses to register on ground of denial of execution.

  The property of the executed, or his representative or assign, denies its execution, any person claiming under such document or his representative, assign, or agent authorized as aforesaid may, within thirty days after the making of the order of refusal,

document or his representative, assign, or agent authorized as aforesaid may, within thirty days after the making of the order of refusal, apply to the Registrar to whom such Sub-Registrar is subordinate in order to establish his right to have the document registered.

- (2) Such application shall be in writing, and shall be accompanied by a copy of the reasons recorded under section 71, and the statements in the application shall be verified by the applicant in manner required by law for the verification of plaints.
- 74. In such case, and also where such denial as aforesaid is

  Procedure of Registrar on made before a Registrar in respect of a document presented for registration to him, the Registrar shall, as soon as conveniently may be, enquire—
  - (a) whether the document has been executed;
  - (b) whether the requirements of the law for the time being in force have been complied with on the part of the applicant or person presenting the document for registration, as the case may be, so as to entitle the document to registration.
- 75. (1) If the Registrar finds that the document has been Order by Registrar to re- executed, and that the said requirements have been complied with, he shall order the document to be registered.
- (2) If the document is duly presented for registration within thirty days after the making of such order, the registering-officer shall obey the same, and thereupon shall, so far as may be practicable, follow the procedure prescribed in sections 58, 59, and 60.
- (3) Such registration shall take effect as it the document had been registered when it was first duly presented for registration.
- (4) The Registrar may, for the purpose of any enquiry under section 74, summon and enforce the attendance of witnesses, and compell them to give evidence, as if he were a Civil Court, and he may also direct by whom the whole or any part of the costs of any such enquiry shall be paid, and such costs shall be recoverable as if they had been awarded in a suit under the Code of Civil Procedure, 1908.\*

Order of refusal by Re- 76. (1) Every Registrar refusing—

(a) to register a document except on the ground that the property to which it relates is not situate within his district, or that the document ought to be registered in the office of a Sub-Registrar, or

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(b) to direct the registration of a document under section 72 or section 75.

shall make an order of refusal, and record the reason for such order in his Book No. 2, and, on application made by any person executing or claiming under the document, shall, without unnecessary delay, give him a copy of the reasons so recorded.

- (2) No appeal lies from any order by a Registrar under this section or section 72.
- 77. (1) Where the Registrar refuses to order the document Suit in case of order of re- to be registered under section 72 or fusal by Registrar. section 76, any person claiming under such document, or his representative, assign, or agent, may, within thirty days after the making of the order of refusal, institute in the Civil Court, within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered, a suit for a decree directing the document to be registered in such office if it be duly presented for registration within thirty days after the passing of such decree.
- (2) The provisions contained in sub-sections (2) and (3) of section 75 shall mutatis mutandis apply to all documents presented for registration in accordance with any such deree, and, notwithstanding anything contained in this Act, the document shall be receivable in evidence in such suit.

#### PART XIII.

OF THE FEES FOR REGISTRATION, SEARCHES, AND COPIES.

78. Subject to the control\* of the Governor-General in Fees to be fixed by Local Council, the Local Government shall Government. prepare a table of fees payable-

- (a) for the registration of documents;
- (b) for searching the registers;
- (c) for making or granting copies of reasons, entries, or documents before, on, or after registration;

and of extra or additional fees payable-

(d) for every registration under section 30;

<sup>\*</sup> Substituted for the word "approval" by Act IV. of 1914.

- (e) for the issue of commissions;
- (f) for filing translations;
- (g) for attending at private residences;
  - (h) for the safe custody and return of documents; and
  - (i) for such other matters as appear to the Local Government necessary to effect the purposes of this Act.
- 79. A table of the fees so payable shall be published in the official gazette, and a copy thereof in English and the vernacular language of the district shall be exposed to public view in every registration-office.
- 80. All fees tor the registration of documents under this Act

  Fees payable on pre-shall be payable on the presentation of such documents.

#### PART XIV.

#### OF PENALTIES.

Penalty for incorrectly endorsing, copying, translating, or registering documents with intent to injure.

Penalty for incorrectly every person employed in his office for the purposes of this Act, who being charged with the endorsing, copying, translating, or registering of any document presented or deposited under its provisions, endorses, copies, translates, or registers such document in a manner which he knows or believes to be incorrect, intending thereby to cause, or knowing it to be likely that he may thereby cause, injury, as defined in the Indian Penal Code,\* to any person, shall be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both.

Penalty for making false statements, delivering false copies or translations, false personation, and abetment.

#### 82. Whoever-

(a) intentionally makes any false statement, whether on oath or not, and whether it has been recorded or not, before any officer acting in execution of this Act in any proceeding or inquiry under this Act; or

- (b) intentionally delivers to a registering officer, in any proceeding under section 19 or section 21, a false copy or translation of a document, or a false copy of a map or plan; or
- (c) falsely personates another, and, in such assumed character, presents any document, or makes any admission or statement, or causes any summons or commission to be issued, or does any other act in any proceeding or inquiry under this Act; or
- (d) abets anything made punishable by this Act;
  shall be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both.
- 83. (1) A prosecution for any offence under this Act coming
  Registering officer may to the knowledge of a registering officer
  commence prosecutions. In his official capacity may be commenced by or with the permission of the Inspector-General, the
  Branch Inspector-General of Sindh, the Registrar, or the SubRegistrar, fn whose territories, district, or sub-district, as the case
  may be, the offence has been committed.
- (2) Offences punishable under this Act shall be triable by any Court or officer exercising powers not less than those of a Magistrate of the second class.
- 84. (1) Every registering officer appointed under this Act shall be deemed to be a public servant within the meaning of the Indian Penal Code.\*
- (2) Every person shall be legally bound to furnish information to such registering officer when required by him to do so.
- (3) In section 228 of the Indian Penal Code,\* the words "judicial proceeding" shall be deemed to include any proceeding under this Act.

# PART XV.

#### MISCELLANEOUS.

85. Documents (other than wills) remaining unclaimed in any Destruction of unclaimed registration-office for a period exceeding documents. two years may be destroyed.

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Registering officer not liable for thing bond fide done or refused in his official capacity.

86. No registering officer shall be liable to any suit, claim, or demand byreason of any thing in good faith done or refused in his official capacity.

Nothing so done invalidated by defect in appointment or procedure.

87. Nothing done in good faith pursuant to this Act or any Act hereby repealed, by any registering officer, shall be deemed invalid merely by reason of any defect in his appointment or procedure.

Registration of documents executed by Government officers, or certain public functionaries.

88. (1) Notwithstanding anything herein contained, it shall not be necessary for any officer of Government, or for the Administrator-General of Bengal, Madras, or Bombay, or for any Official Trustee or Official

Assignee, or for the Sheriff, Receiver, or Registrar of a High Court, to appear in person or by agent at any registration-office in any proceeding connected with the registration of any instrument executed by him in his official capacity, or to sign as provided in section 58.

- (2) Where any instrument is so executed, the registering officer to whom such instrument is presented for registration may, if he thinks fit, refer to any Secretary to Government, or to such officer of Government, Administrator-General, Official Trustee, Official Assignee, Sheriff, Receiver, or Registrar, as the case may be, for information respecting the same, and, on being satisfied of the execution thereof, shall register the instrument.
- Copies of certain orders, certificates, and instruments to be sent to registering officers, and filed.

89. (1) Every officer granting a loan under the Land Improve ment Loans Act, 1883,\* shall send a copy of his order to the registering officer within the local limits of whose jurisdiction the whole or any part of the

land to be improved, or of the land to be granted as collateral security, situate; and such registering officer shall file the copy in his Book No. 1

(2) Every Court granting a certificate of sale of immoveable property under the Code of Civil Procedure, 1908,† shall send a copy of such certificate to the registering officer within the local limits of whose jurisdiction the whole or any part of the immoveable property comprised in such certificate is situate, and such officer shall file the copy in his Book No. 1.

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- (b) intentionally delivers to a registering officer, in any proceeding under section 19 or section 21, a false copy or translation of a document, or a false copy of a map or plan; or
- (c) falsely personates another, and, in such assumed character, presents any document, or makes any admission or statement, or causes any summons or commission to be issued, or does any other act in any proceeding or inquiry under this Act; or
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- 39. (1) Every officer granting a loan under the Land Improve ment Loans Act, 1883,\* shall send a Copies of certain orders, copy of his order to the registering officer within the local limits of whose certificates, and instruments to be sent to registering officers, and filed. jurisdiction the whole or any part of the land to be improved, or of the land to be granted as collateral security, situate; and such registering officer shall file the copy in his Book No. 1.
- (2) Every Court granting a certificate of sale of immoveable property under the Code of Civil Procedure, 1908,† shall send a copy of such certificate to the registering officer within the local limits of whose jurisdiction the whole or any part of the immoveable property comprised in such certificate is situate, and such officer shall file the copy in his Book No. 1.

- (3) Every officer granting a loan under the Agriculturists' Loans Act, 1884,\* shall send a copy of any instrument whereby immoveable property is mortgaged for the purpose of securing the repayment of the loan, and, if any such property is mortgaged for the same purpose in the order granting the loan, a copy also of that order, to the registering officer within the local limits of whose jurisdiction the whole or any part of the property so mortgaged is situate, and such registering officer shall file the copy or copies, as the case may be, in his Book No. 1.
- (4) Every Revenue-officer granting a certificate of sale to the purchaser of immoveable property sold by public auction shall send a copy of the certificate to the registering-officer within the local limits of whose jurisdiction the whole or any part of the property comprised in the certificate is situate, and such officer shall file the copy in his Book No. 1.

#### Exemptions from Act.

- **90.** (1) Nothing contained in this Act, or in the Indian Registration of certain docutration Act, 1877,† or in the Indian Registration Act, 1871,‡ or in any Act thereby of Government.

  repealed, shall be deemed to require, or to have at any time required, the Registration of any of the following documents or maps, namely—
  - (a) documents issued, received, or attested by any officer engaged in making a settlement or revision of settlement of land revenue, and which form part of the records of such settlement; or
  - (b) documents and maps issued, received or authenticated by any officer engaged on behalf or Government in making or revising the survey of any land, and which form part of the record of such survey; or
  - (e) documents which, under any law for the time being in force, are filed periodically in any revenue-office by patwaries or other officers charged with the preparation of village-records; or
  - (d) sanads, inam, title-deeds, and other documents purporting to be or to evidence grants or assignments by Government of land, or of any interest in land; or

<sup>\*</sup> Act XII. of 1884. † Act III. of 1877. ‡ Act VIII. of 1874.

- (e) notices given under section 74 or section 76 of the Bombay Land revenue Code, 1879.\* of relinquishment of occupancy by occupants, or of alienated land by holders of such land.
- (2) All such documents and maps shall, for the purposes of sections 48 and 49, be deemed to have been and to be registered in accordance with the provisions of this Act.
- 91. Subject to such rules and the previous payment of such Inspection and copies of fees as the Local Government prescribes in this behalf, all documents and maps mentioned in section 90, clauses (a), (b), (c), and (e), and all registers of the documents mentioned in clause (d), shall be open to the inspection of any person applying to inspect the same, and, subject as aforesaid, copies of such documents shall be given to all persons applying for such copies.
- 92. All rules relating to registration enforced in Lower Burmese registration rules Burma prior to the commencement of the Iudian Registration Act, 1877,† shall be deemed to have had the force of law, and no suit or other proceeding shall be maintained against any officer or other person in respect of anything done under any of the said rules.

#### Repeals.

- **93.** (1) The enactments mentioned in the Schedule are repealed to the extent specified in the fourth column thereof.
- (2) Nothing herein contained shall be deemed to affect any provision of any enactment in force in any part of British India, and not hereby expressly repealed.

† Act III. of 1877.

<sup>\*</sup> Bom. Act. V. of 1879.

## THE SCHEDULE:

## REPEAL OF ENACTMENTS.

(See section 93.)

Year	. No	Short title.	Extent of repeal.
1877	III.	The Indian Registration Act, 1877.	The whole,
1879	XII.	The Registration and Limitation Acts Amendment Act, 1879.	So much as is unrepealed
1883	XIX.	The Land Improvement Loans Act, 1883.	So much of section 12 as is unrepealed.
1886	VII.	The Indian Registration Act, 1886.	The whole.
1888	VII.	The Civil Procedure Code Amendment Act, 1888.	So much as is unrepealed.
1891	XII.	The Amending Act, 1891	In the Second Schedule, the entries relating to Act III. of 1877.
1899	XVII.	The Indian Registration Amendment Act, 1899.	The whole.

#### THE

# INDIAN SUCCESSION ACT, 1865. BEING ACT NO. X. OF 1865, AS AMENDED UP TO 31ST FANUARY, 1918.

BY

D. E. CRANENBURGH.

PLEADER .;

#### PUBLISHED BY

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## ACT NO. X. OF 1865.

The Indian Succession Act, 1865.

### ARRANGEMENT OF SECTIONS.

#### PAKT I.

#### PRELIMINARY.

#### SECTIONS.

- 1. Short Title.
- Act to constitute law of British India in cases of intestate or testamentary succession.
- 3. Interpretation clause.
- 4. Interests and powers not acquired nor lost by marriage.

#### PART II.

#### OF DOMICILE.

- Law regulating succession to deceased person's immovable and moveable property respectively.
- 6. One domicile only affects suc-
- 7. Domicile of origin of person of legitimate birth.
  8. Domicile of origin of illegiti-
- mate child.

  9. Continuance of domicile of
- origin.

  10. Acquisition of new domicile.
- Tr. Special mode of acquiring domicile in British India.
- Domicile not acquired by residence as representative of foreign Government, or as part of his family.
- -13. Continuance of new domicile.
- 14. Minor's domicile.

#### SECTIONS,

- 15. Domicile acquired by woman on marriage.
- Wife's domicile during marriage.
- 17. Minor's acquisition of new domicile.
- 18. Lunatic's acquisition of new domicile.
- Succession to moveable property in British India in absence of proof of domicile elsewhere.

## PART III. Camel

#### OF CONSANGUINITY.

- 20. Kindred or consanguinity.
- 22. Collateral consanguinity.
- 23. Persons held for purpose of succession to be similarly related to deceased.
- 24. Mode of computing degrees of kindred.

## PART IV. Council

- OF INTESTACY.
- As to what property deceased considered to have died intestate.
- 26. Devolution of such property.-
- 27. Where intestate has left widow and lineal descendants, or widow and kindred only, or widow and no kindred;

 Where intestate has left no widow, and where he has left no kindred.

## Omit PART V.

OF THE DISTRIBUTION OF AN INTESTATE'S PROPERTY—

## (a.)—Where he has left Lineal Descendants:

20. Rules of distribution .-

30. Where intestate has left child cr children only:

31. Where intestate has left no child, but grandchild or grand-children:

32. Where intestate has left only great-grandchildren or remoter lineal descendants:

23. Where intestate leaves lineal descendants not all in same degree of kindred to him, and those through whom the more remote descend are dead.

#### (b.)—Where the Intestate has left no Lineal Descendants:

34. Rules of distribution where intestate has left no lineal descendants:

35. Where intestate's father living:
36. Where intestate's father dead, but his mother, brothers, and sisters living:

 Where intestate's father dead, and his mother a brother or sister, and children of any deceased brother or sister living:

38. Where intestate's father dead, and his mother and children of any deceased brother or sister living:

39. Where intestate's father dead
but his mother living, and no
brother, sister, nephew, or
alege: 25

#### SECTIONS.

40. Where intestate has left neither lineal descendant, nor father, nor mother:

41. Where intestate has left neither lineal descendant, nor parent nor brother, nor sister.

42. Children's advancements not to be brought into hotchpot.

#### PART VI.

OF THE EFFECT OF MARRIAGE AND MARRIAGE-SETTLEMENTS ON PROPERTY.

43. Rights of widower and widow respectively.

 Effect of marriage between person domiciled, and one not domiciled, in British India.

45. Settlement of minor's property in contemplation of marriage.

#### PART VII.

#### OF WILLS AND CODICILS.

Persons capable of making wills.

47. Testamentary guardian.

48. Will obtained by fraud, coercion, or importunity.

49. Will may be revoked or altered.

#### PART VIII.

OF THE EXECUTION OF UNPRIVE-LEGED WILLS.

Execution of unprivileged wills.
 Incorporation of papers by reference.

#### PART IX.

#### OF PRIVILEGED WILLS.

52. Privileged will.

 Mode of making, and rules for executing, privileged wills.

#### PART X.

OF THE ATTESTATION, REVOCATION, ALTERATION AND REVIVAL OF WILLS.

- 54. Effect of gift to attesting witness.
- 55. Witness not disqualified by interest or by being executor.
  56. Revocation of will by testator's

marriage.

- Power of appointment defined.

  57. Revocation of unprivileged will or codicil.
- Effect of obliteration, interlineation or alteration in unprivileged will.

 Revocation of privileged will or codicil.

60. Revival of unprivileged will. Extent of revival of will or codicil partly revoked and afterwards wholly revoked.

#### PART XI.

OF THE CONSTRUCTION OF WILLS.

61. Wording of will.

 62 Inquiries to determine questions as to object or subject of will.
 63. Misnomer or misdescription of

object.

- 64. When words may be supplied.
- 65. Rejection of erroneous particulars in description of subject.
  66. When part of description may
- not be rejected as erroneous.

  67. Extrinsic evidence admissible in case of latent ambiguity.
- 68. Extrinsic evidence inadmissible in cases of patent ambiguity or deficiency.

бо. Meaning of clause to be collected from entire will.

- When words may be understood in restricted sense, and when in sense wider than usual.
- 71. Which of two possible constructions preferred.

SECTIONS.

- No part rejected if it can be reasonably construed.
- 73. Interpretation of words repeated in different parts of will.
- 74. Testator's intention to be effectuated as far as possible
- 75. The last of two inconsistent clauses prevails
- Will or bequest void for uncertainty.
- Words describing subject refer to property answering description at testator's death.

78 Power of appointment executed by general bequest.

- 79 Implied gift to objects of power in default of appointment.
- Bequest to "heirs," etc. of particular person without qualifying terms.
- 81. Bequest to "representatives," &c., of particular person.
- Bequest without words of limitation.

83. Bequest in alternative.

- 84. Effect of words describing a class added to bequest to a person.
- 85. Bequest to class of persons under general description only.

86. Construction of terms.

- 87. Words expressing relationship denote only legitimate relatives, or, failing such relatives, reputed legitimate.
- 88. Rules of construction where will purports to make two bequests to same person.
- 89. Constitution of residuary legatee.
- 90. Property to which residuary legatee entitled.
- 91. Time of vesting of legacy in general terms.
- 02. In what case legacy lapses.
- Legacy does not lapse if one of two joint legatees die before testator.
- 94. Effect of words showing testator's intention to give distinct shares.

- 95. When lapsed share goes as undisposed of.
- 96. When bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime.
- 97. Bequest to A for benefit of B does not lapse by A's death.
- 98. Survivorship in case of bequest to described class.

#### PART XII.

#### OF VOID BEQUESTS.

- Bequest to person by particular description, who is not in existence at testator's death.
- 100. Bequest to person not in existence at testator's death, subject to prior bequest.
- 101. Rule against perpetuity.
- 102. Bequest to a class, some of whom may come under rules in sections 100 and 101.
- 103. Bequest to take effect on failure of bequest void under section 100, 101, or 102.
- 104. Effect of direction for accumulation.
- 105. Bequest to religious or charitable uses.

#### PART XIII.

- OF THE VESTING OF LEGACIES.
- Date of vesting of legacy when payment or possession postponed.
- 107. Date of vesting when legacy contingent upon specified uncertain event.
- to such members of a class as shall have attained particular age.

#### PART XIV.

OF ONEROUS BEQUESTS.

109. Onerous bequest.

#### SECTIONS.

110. One of two separate and independent bequests to some person may be accepted, and the other refused.

#### PART XV.

#### OF CONTINGENT BEQUESTS.

- iii. Bequest contingent apon specified uncertain event no time being mentioned for its occurrence.
- 112. Bequest to such of certain persons as shall be surviving at some period not specified.

#### PART XVI.

#### OF CONDITIONAL BEQUESTS.

- 113. Bequest upon impossible con-
- 114. Bequest upon illegal or immoral condition.
- dent to vesting of legacy.
- 116. Bequest to A and, on failure of prior bequest, to B.
- 117. When second bequest not to take effect on failure of first.
- 118. Bequest over conditional upon happening or not happening of specified uncertain event.
- 119. Condition must be strictly fulfilled.
- 120. Original bequest not affected by invalidity of second.
- 121. Bequest conditioned that it shall cease to have effect in case specified uncertain event shall happen or not happen
- 122. Such condition must not be invalid under section 107.
- 123 Result of legatee rendering impossible or indefinitely postponing act for which no time sp-cified, and, on non-performance of which, subjectmatter to go over.

124. Performance of condition, precedent or subsequent within specified time.

Further time in case of fraud.

#### PART XVII.

OF BEQUESTS WITH DIRECTIONS AS TO APPICATION OR ENJOYMENT.

i25. Direction that fund be enployed in particular manner following absolute bequest of same to or for benefit of any person.

126. Direction that mode of enjoyment of absolute bequest is to be restricted to secure specified benefit for legatee.

127. Bequest of fund for certain purposes some of which cannot be fulfilled.

#### PART XVIII.

OF BEQUESTS TO AN EXECUTOR.

128. Legatee named as executor cannot take unless he shows intention to act as executor.

#### PART XIX.

#### OF SPECIFIC LEGACIES.

129. Specific legacy defined.

130. Bequest of sum certain where stocks, &c., in which invested are described.

131. Bequest of stock where testator had, at date of will, equal or greater amount of stock of same kind.

132. Bequest of money where not payable until part of testator's property disposed of in certain way.

133. When enumerated articles not deemed specifically bequeath-

134. Retention, in form, of specific bequest to several persons in succession.

SECTIONS.

135. Sale and investment of proceeds of property bequeathed to two or more persons in succession.

136. Where deficiency of assets to pay legacies, specific legacy not to abate with genera

legacies.

#### PART XX.

OF DEMONSTRATIVE LEGACIES.

 Demonstrative legacy defined.
 Order of payment when legacy directed to be paid out of fund the subject of specific legacy.

#### PART XXI.

#### OF ADEMPTION OF LEGACIES.

139. Ademption explained.

140. Non-ademption of demonstrative legacy.

141. Ademption of specific bequest of right to receive something from third party.

142. Ademption pro tanto by testator's receipt of part of entire thing specifically bequeathed.

143. Ademption pro tanto by testator's receipt of portion of entire fund, of which portion has been specifically bequeathed.

144. Order of payment where portion of fund specifically bequeathed to one legatee, and legacy charged on same fund to another, and, testator having received portion of that fund, remainder insufficient to pay both legacies.

145. Ademption where stock specifically bequeathed does not exist at testator's death.

146. Ademption pro tanto where stock specifically bequeathed exists in part only at testator's death.

147. Non-ademption of specific bequest of goods described as connected with certain place by reason of removal.

148. When removal of thing bequeathed does not constitute

ademption.

149. When thing bequeathed is a valuable to be received by testator from third person, and testator himself or his representative receives it.

150. Change by operation of law of subject of specific bequest between date of will and testator's death.

\$151. Change of subject without tes-

tator's knowledge.

152. Stock specifically bequeathed. lent to third party on condition that it be replaced.

153. Stock, specifically bequeathed, sold, but replaced and belong. ing to testator at his death.

#### PART XXII.

OF THE PAYMENT OF LIABILITIES IN RESPECT OF THE SUBJECT OF A BROUEST.

154. Non-liability of executor to exonerate specific legatees.

155. Completion of testator's title to things bequeathed to be at costs of his estate.

156. Exoneration of legatees immoveable property for which land-revenue or rent payable periodically.

157. Exoneration or specific legatee's stock in joint Stock Company.

#### PART XXIII.

OF BEQUESTS OF THINGS DESCRIBED IN GENERAL TERMS.

158. Bequest of thing described in 171. Person deriving benefit indirectgeneral terms.

#### SECTIONS.

#### PART XXIV. 5

OF BEQUESTS OF THE INTERESTS OR PRODUCE OF A FUND.

159. Bequest of interest or produce of fund.

#### PART XXV.

OF BRQUESTS OF ANNUITIES.

160. Annuity created by will payable for life only unless contrary intention appears by will.

161. Period of vesting where will directs that annuity be provided out of proceeds of property, or out of property generally, or where money bequeathed to be invested in purchase of annuity.

162. Abatement of annuity

163. Where gift of annuity and residuary gift, whole annuity to be first satisfied.

#### PART XXVI.

OF LEGACIES TO CREDITORS AND PORTIONERS.

164. Creditor prima facie entitled to legacy as well as debt.

165. Child prima facie entitled to legacy as well as portion.

166. No ademption by subsequent provision for legatee.

#### PART XXVII.

#### OF ELECTION.

167. Circumstances in which election takes place.

168. Devolution of interest relinquished by owner.

169. Testator's belief as to his ownership immaterial.

170. Bequest for man's benefit how regarded for purpose of election.

is your put to election.

172. Person taking in individual capacity under will may, in other character, elect to take in opposition.

173. When acceptance of benefit given by will constitutes election to take under will.

174. Presumption arising from enjoyment by legatee for two years.

175. Confirmation of bequest by act of legatee.

176. When testator's representatives Business may call upon legatee to elect.
Effect of non-compliance.

177. Postponement of election in case of disability

#### PART XXVIII.

## OF GIFTS IN CONTEMPLATION OF DEATH.

178. Property tansferable by gift made in contemplation of death.

When gift said to be made in contemplation of death. Such gift resumable.

When it fails,

#### PART XXIX.

OF GRANT OF PROBATE AND LETTERS
OF ADMINISTRATION.

179. Character and property of executor or administrator as such.

180. Administration with copy annexed of authenticated copy of will proved abroad.

181. Probate only to appointed executor.

182. Appointment, express or impli-

183. Persons to whom probate cannot be granted.

184. Grant of probate to several executors simultaneously or at different times.

185. Separate probate of codicil discovered after grant of probate.

#### SECTIONS.

Procedure when different executors appointed by codicil.

186. Accrual of representation to surviving executor.

187. Right as executor or legatee when established.

188. Effect of probate.

189. To whom administration may not be granted.

190. Right to intestate's property when established.

191. Effect of letters of administration.

192. Acts not validated by administration.

193. Grant of administration where executor has not renounced. Exception.

194. Form and effect of renunciation of executorship.

195. Procedure where executor renounces or fails to accept within time limited.

196. Grant of administration to universal or residuary legatee.

 Right to administration of representative of deceased residuary legatee.

198. Grant of administration where no executor nor residuary legatee, nor representative of such legatee.

199. Citation before grant of administration to legatee other than universal or residuary.

200. Order in which connections entitled to administer.

 Administration to widow unless Court see cause to exclude her.

202. Association with widow in administration.

203. Administration where no widow or widow excluded.

Proviso.

204. Title of kindred to administration.

205. Right of widower to administration of wife's estate.

206. Grant jof administration to creditor.

207. Administration where property 223. Administration limited to pur-

## Cemit PART XXX.

#### OF LIMITED GRANTS.

#### (a.) - Grants limited in Duration.

- 208. Probate of copy or draft of lost will.
- 209. Probate of contents of lost or destroyed will.
- 210. Probate of copy where original exists.
- 211. Administration until will produced.
- (b.)—Grants for the Use and Benefit of others having Right.
- 212. Administration, with will annexed, to attorney of absent executor.
- 213. Administration, with will annexed, to attorney of absent person who, if present, would be entitled to administer.
- 214. Administration to attorney of absent person entitled to administer in case of intestacy.
- 215. Administration during minority of sole executor or residuary legatee.
- aid. Administration during minority of several executors or residuary legatees.
- 217. Administration for use and benefit of lunatic jus habens.
- 218. Administration pendente lite.

#### (c.)—For Special Purposes.

- 219. Probate limited to purpose specified in will.
- 220. Administration with will annexit ed limited to particular purpose.
- perty in which person has beneficial interest.
- 222. Administration limited to suit.

#### SECTIONS.

- 223. Administration limited to purpose of becoming party to suit to be brought against administrator.
- 224. Administration limited to collection and preservation of deceased's property.
- 225. Appointment, as administrator, of person other than one who, under ordinary circumstances, would be entitled to administration.

#### (d.) - Grants with Exception.

- 226. Probate or administration with will annexed subject to exception.
- 227. Administration with exception.

#### (e.) - Grants of the Rest.

228. Probate or administration of rest.

#### (f.)—Grants of Effects unad. ministered.

- 229. Grant of effects unadministered.
  230. Rules as to grants of effects
  unadministered.
- 231. Administration when limited grant expired, and still some part of estate unadministered.

#### (g.) -Alteration in Grants.

- 232. What errors may be rectified by Court.
- Procedure where codicil discovered after grant of administration with will annexed.

#### (h.) - Revocation of Grants.

234. Revocation or annulment for just cause."

PART XXXI. Quit

OF THE PRACTICE IN GRANTING AND REVOKING PROBATES AND LETTERS OF ADMINISTRATION.

235. Jurisdiction of District Judge in granting and revoking probates, &c.

235A. Power to appoint Delegate or District Judge to deal with non-contentious cases.

236. District Judge's powers as to grant of probate and administration.

237. District Judge may order person to produce testamentary papers.

238. Proceedings of District Judge's Court in relation to probate and administration.

239. When and how District Judge to interfere for protection of property.

 When probate or administration may be granted by District Judge.

 Disposal of application made to Judge of District in which deceased had no fixed abode.

241A. Probate and letters of administration may be granted by Delegate.

242. Conclusiveness of probate or letters of administration.

Effect of unlimited probates, &c.,

granted by High Court
242A. Transmission to High Courts
of certificates of grants under
proviso to section 242.

243. Conclusiveness of application for probate or administration if properly made and verified.

244. Petition for probate.

245. In what cases translation of will to be annexed to petition. Verification of translation by person other than Court translator.

 Petition for letters of administration. SECTIONS.

246A. Addition to statements in petition, &c., for probate or letters of anministration in certain cases.

247. Petition for probate or administration to be signed and verified.

248. Verification of petition for probate by one witness to will.

249. Punishment for false averment in petition or declaration.

250. District Judge may examine petitioner in person, require further evidence, and issue citations to inspect proceedings. Publication of citation.

251. Caveats against grant of probate or administration.

252. Form of caveat

253. After entry of caveat, no proceeding taken on petition until after notice to caveator.

253A. District Delegate when not to grant probate or administration.

253B. Power to transmit statement to District Judge in doubtful cases where no contention.

253C. Procedure where there is contention, or District Delegate thinks probate or letters of administration should be refused in his Court.

254. Grant of probate to be under seal of Court.

Form of such grant,

255. Grant of letters of administration to be under seal of Court,
Form of such grant.

256. Administration-bond.

257. Assignment of administrationbond.

258. Time for grant of probate and administration.

 Filing of original wills of which probate or administration with will annexed granted,

260. Grantee of probate or administration alone to sue, &c., untilsame revoked.

261. Procedure in contentious cases.

262. Payment to executor or administrator before probate or administration re-revoked.

Right of such executor or administrator to re-coup himself.

263. Appeals from orders of District Judge.

264. Concurrent jurisdiction of High Court.

#### PART XXXII.

OF EXECUTORS OF THEIR OWN WRONG.

265. Executor of his own wrong.266. Liability of executor of his own wrong.

#### PART XXXIII.

OF THE POWERS OF AN EXECUTOR OR ADMINISTRATOR.—

267. In respect of causes of action surviving deceased, and rents due at death.

a68. Demands and rights of action of or against deceased survivor to and against executor or administrator.

aco. Power of executor or administrator to dispose of property.

270. Purchase by executor or administrator of deceased's property.

271. Powers of several executors or administrators exercisible by one.

272. Survival of powers on death of one of several executors or administrators.

273. Powers of administrators of effects unadministered.

\$74: Powers of administrator during minority.

275. Powers of married executrix or administratrix.

The Comment

#### SECTIONS.

#### PART XXXIV.

OF THE DUTIES OF AN EXECUTOR OR ADMINISTRATOR.—

276. As to deceased's funernal.

277. Inventory and account.

277A. Inventory to include property in any part of British India in certain cases.

278. As to property of, and debts owing to deceased

 Expenses to be paid before all debts.

280. Expenses to be paid next after such expenses.

 Wages for certain services to be next paid, and then other debts.

282. Save as aforesaid, all debts to be paid equally and rateably.

283. Application of moveable property to payment of debts, where domicile not in British India.

284. Creditor paid in part under section 283 to bring payment into account before sharing in proceeds of immoveable property.

285. Debts to be paid before legacies.

 Executor or administrator not bound to pay legacies without idemnity.

Abatement of general legacies.
 Executor not to pay one legatee in preference to another.

288. Non abatement of specific legacy when assests sufficient to pay debts.

289. Right under demonstrative legacy when assets sufficient to pay debts and necessary expenses.

290. Rateable abatement of specific legacies.

201. Legacies treated as general for purposes of abatement.

#### SECTIONS PART XXXV.

OF THE EXECUTOR'S ASSENT TO A LEGACY.

292. Assent necessary to complete legatee's title.

293. Effect of executor's assent to specific legacy. Nature of assent.

294. Conditional Assent.

295. Assent of executor to his own legacy.

Implied assent.

206. Effect of executor's assent.

297. Executor when to deliver lega-

#### Court PART XXXVI.

OF THE PAYMENT AND APPORTION-MENT OF ANNUITIES.

298. Commencement of annuity when no time fixed by will.

299. When annuity, to be paid quarterly or monthly, first falls due.

300. Dates of successive payments when first payment directed to be made whithin given time or on day certain.

Apportionment where annuitant dies between times of payment.

# Comil PART XXXVII.

OF THE INVESTMENT OF FUNDS TO PROVIDE FOR LEGACIES.

301. Investment of sum bequeathed where legacy, not specific, given for life.

302. Investment of general legacy to be paid at future time. Intermediate interest,

303. Procedure when no fund charged with, or appropriated to, annuity.

304. Transfer to residuary legatee of contingent bequest.

SECTIONS.

305. Investment of residue bequeath. ed for life, without direction to invest in particular securi-

306. Investment of residue bequeathed for life with direction to invest in specified securities.

307. Time and manner of conversion and investment.

Interest payable nutil investment.

308. Procedure where minor entitled to immediate payment or possession of bequest, and no direction to pay to person on

his behalf.

## PART XXXVIII. Quest

OF THE PRODUCE AND INTEREST OF LEGACIES.

309. Legatee's title to produce of specific legacy.

310. Residuary legatee's title to produce of residuary fund.

311. Interest when no time fixed for payment of general legacy.

312. Interest when time fixed.

313. Rate of interest.

314. No interest on arrears of annuity within first year after testator's death.

315. Interest on sum to be invested to produce annuity.

## PART XXXIX Ceriet

OF THE REFUNDING OF LEGACIES.

316. Refund of legacy paid under Judge's orders.

317. No refund if paid voluntarily. 318. Refund when legacy has be-come due on performance of

condition within further time allowed under section 124.

319. When each legatee compellable to refund in proportion.

320. Distribution of assets. Creditor may follow assets.

321. Creditor may call upon legatee

to refund.

322. When legatee, not satisfied or compelled to refund under section 321, cannot oblige one paid in full to refund.

323. When unsatisfied legatee must first proceed against executor, if solvent.

324. Limit to refunding of one legatee to another.

325. Refunding to be without inter-

326. Residue after usal payments to be paid to residuary legatee.

326A. Transfer of assets from British India to executor or administrator in country of domicile for distribution.

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SECTIONS.

Queit PART XL.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR FOR DEVASTA-TION.

327. Liability of executor or administrator for devastation

328. Liability of executor for neglect to get in any part of property.

#### PART XLI.

#### MISCELLANBOUS.

329. ] [Repealed.]

331. Succession to property Hindus, &c., and certain wills. intestacies, and marriages not affected.

332. Power of Governor-General in Council to exempt any race, sect, or tribe in British India from operation of Act.

333 Surrender or revoked probate or letter of administration.

SCHEDULE-[Repealed.]

## ACT NO. X. OF 1865:\*

The Indian Succession Act, 1865.

RECEIVED THE G.-G'S ASSENT ON THE 16TH MARCH 1865.

An Act to amend and define the Law of Intestate and Testamentary Succession in British India.

WHEREAS it is expedient to amend and define the rules of law applicable to Intestate and Testamentary Preamble. Succession in British India; It is enacted as follows :--

#### PART I.

#### PRELIMINARY.

Short title.

1. This Act may be cited as "The Indian Succession Act, 1865."

Act to constitute law of British India in cases of intestate or testamentary succession.

2. Except as provided by this Act, or by any other law for the time being in force, the rules herein contained shall constitute the law of British India applicable to all cases of intestate or testamentary succession.+

Act X. of 1865 has been declared in force in-

(1) the Santhal Parganas (see Reg. III. of 1872, s. 3, as amended by Reg. III. of 1886):

(2) the Arakan Hill District, but not so as to affect Native Christians (see Reg. IX. of 1874, s. 3): (3) Upper Burma generally except the Shan States (see Act XX.

of 1886, s. 6):

(4) British Baluchistan (see Reg. I. of 1890, s. 3).

The Act has been declared, under the Scheduled Districts Act (XIV. of[1874), to be in force in the following Scheduled Districts:-

The districts of Hazaribagh, Lohardaga, and Manbhum, and Pargana Dhalbhum, and the Kolhan in the district of Singbhum. - See Gasette of India, Oct. 22, 1881. Pt. I., p. 504

The North-Western Provinces Tarai. - See Gasette of India, Sep. 23.

1876, Pt. I, p. 505.

As to the application of portions of the Act to the wills of Hindus. Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay, see the Hindu Wills Act (XXI. of 1870).

As to the exemption of Parsis from portions of the Act, see the Parsi Intestate Succession Act (XXI. of 1865). For further exemptions from the Act, see 83. 331, 332, infra.

† See 12 B. L. R. 427.

Interpretation-clause.

3.\* In this Act, unless there be something repugnant in the subject or context .--

"Person" includes

any company or association, or body or persons, whether incorporated or not :

"Year." " Month."

"Person,"

"Year" and "month" respectively mean a year and month reckoned according to the British calendar:

"Immoveable property."

"Immoveable property" includes land, incorporeal tenements, and things attached to the earth, or permanently fastened to anything which is attached to the earth:

" Moveable property."

"Moveable property" means property of every description except immoveable property:

" Province."

"Province" includes any division of British India having a Court of the last resort:

"British India" means the territories which are or may become vested in Her Majesty or Her "British India. Successors by the Statute 21 and 22 Vict., cap. 106 (An Act for the better Government of India): 1

"District Judge."

"District Judge" means the Judge of a principal Civil Court of original jurisdiction:

" Minor." "Minority."

"Minor" means any person who shall not have completed the age of eighteen years, and "minority" means the status of such person:

<sup>\*</sup> Compare the Probate and Administration Act (V. of 1881), s. 3. † Here certain words, repealed by the Repealing Act (XII. of 1801). have been omitted.

Words repealed by Act X. of 1914 have been omitted here. § See 1 B. L. R., O. C. J., 13, Act IX. of 1875. s. 3.

"Will." means the legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death:

"Codicil" means an instrument made in relation to a will, and explaining, altering or adding to its dispositions. It is considered as forming an additional part of the will:

"Probate" means the copy of a will certified under the seal of a Court of competent jurisdiction, with a grant of administration to the estate of the testator:

"Executor" means a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided:

"Administrator" means a person appointed by competent authority to administer the estate of a deceased person when there is no executor:

And in every part of British India to which this Act shall "Local Government." extend, "Local Government" shall mean the person authorized by law to administer executive government in such part; and

"High Court" shall mean the highest Civil Court of Appeal therein, and for the purposes of sections 242, 242A, 246A, and 277A, shall melude the Court of the Recorder of Rangoon.

4. No person shall, by marriage, acquire any interest in the Interests and powers not property of the person whom he or she acquired nor lost by maries, nor become incapable of doing riage.

<sup>\*</sup> The definition of "High Court" has been added by the Probatess and Letters of Administration Act (XIII. of 1875), s. 1; but the portion italicized has been repealed in Lower Burma by the Lower Burma Courts Act (VI. of 1900).

any act in respect of his or her own property which he or she could have done if unmarried.\*

#### PART II.

#### OF DOMICILE.

Law regulating succession to deceased person's im-moveable and moveable property respectively.

5. Succession to the immoveable property in British India of a person deceased is regulated by the law of British India, wherever he may have had his domicile at the time of his death.

Succession to the moveable property of a person deceased is regulated by the law of the country in which he had his domicile at the time of his death.

#### Illustrations

- (a) A, having his domicile in British India, dies in France, leaving moveable property in France, moveable property in England, and property, both moveable and immoveable, in British India: The succession to the whole is regulated by the law of British India.
- (b) A, an Englishman, having his domicile in France, dies in British India, and leaves property, both moveable and immoveable, in British India. The succession to the moveable property is regulated by the rules which govern, in France, the succession to the moveable property of an Buglishman dying domiciled in France, and the succession to the immoveable property is regulated by the law of British India.
- "One domicile only affects succession to moveables."
- 6. A person can only have one domicile for the purpose of succession to his moveable property.
- 7. The domicile of origin of every person of legitimate birth Domicile of origin of per- is in the country in which at the time of son of legitimate birth. his birth, his father was domiciled: or, if he is a posthumous child, in the country in which his father was demiciled at the time of the father's death.

See 8 B. L. R. 372. "This section shall not apply, and shall be deemed never to have applied, to any marriage, one or both of the parties to which professed, at the time, of the marriage, the Hindu, Mahomedan, Buddhist Sikh, or Jaina religion."-Married Women's Property Act (III. of 2-- 2 . 3 . 3 . 11

#### Illustration.

At the time of the birth of A, his father was domiciled in England:
A's domicile of origin is in England, whatever may be the country in which
he was born.

8. The domicile of origin of an illegitimate child is in the Domicile of origin of illegitimate child. country in which, at the time of his birth, his mother was domiciled.

Continuance of domicile or origin.

9. The domicile of origin prevails until a new domicile has been acquired.

Acquisition of new domicile. Acquisition of new domicile habitation in a country which is not that of his domicile of origin.

Explanation.—A man is not to be considered as having taken up his fixed habitation in British India merely by reason of his residing there in Her Majesty's civil or military service, or in the exercise of any profession or calling.

#### Illustrations.

- (a) A, whose domicile of origin is in England, proceeds to British India, where he settles as a barrister or a merchant, intending to reside there during the remainder of his life: His domicile is now in British India.
- (b) A, whose domicile is in England, goes to Austria, and enters the Austrian service, intending to remain in that service: A has acquired a domicile in Austria.
- (c) A, whose domicile of origin is in France, comes to reside in British India under an engagement with the British Indian Government for a certain number of years. It is his intention to return to France at the end of that period: He does not acquire a domicile in British Iodia.
- (d) A, whose domicile is in England, goes to reside in British India for the purpose of winding up the affairs of a partnership which has been dissolved, and with the intention of returning to England as soon as that purpose is accomplished: He does not by such residence, acquire a domicile in British India, however long the residence may last.
- (e) A, having gone to reside in British India under the circumstance mentioned in the last preceding illustration, afterwards alters his intention, and takes up his fixed habitation in British India: A has acquired a domicile in British India.
- (f) A, whose domicile is in the French Settlement of Chandernagore, is compelled by political events to fake refuge in Calcutta, and resides in

Calcutta for many years in the hope of such political changes as may enable him to return with safety to Chandernagore: He does not, by such esidence, acquire a domicile in British India.

- (g) A, having come to Calcutta under the circumstances stated in the ast preceding illustration, continues to reside there after such political changes have occurred as would enable him to return with safety to Chandermagore, and he intends that his residence in Calcutta shall be permanent; A has acquired a domicile in British India.
- Special mode of acquire making and depositing in some office in British India by Special mode of acquire making and depositing in some office in British in British India (to be fixed by the Local India.

  Government) a declaration in writing under his hand of his desire to acquire such domicile, provided that he shall have been resident in British India for one year immediately preceding the time of his making such declaration.
- Domicile not acquired by country to be its ambassador, consul, or of their representative in another country, does not acquire a domicile in the latter country by reason only of residing there in pursuance of his appointment; nor does any other person acquire such domicile by reason only of residing with him as part of his family or as a servant.
- 13. A new domicile continues until the former domicile

  Continuance of new has been resumed, or another has been adomicile.

  acquired.
  - 14. The domicile of a minor follows the domicile of the Minor's domicile. parent from whom he derived his domicile of origin.

Exception.—The domicile of a minor does not change with that of his parent if the minor is married, or holds any office or employment in the service of Her Majesty, or has set up, with the consent of the parent, in any distinct business.

15. By marriage a woman acquires the domicile of her busband if she had not the same domiwoman on marriage. . cile before.

Wife's domicile during marriage.

16. The wife's domicile during the marriage follows the domicile of her husband.

Exception.—The wife's domicile no longer follows that of her husband if they be separated by the sentence of a competent Court, or if the husband is undergoing a sentence of transportation.

- 17. Except in the cases above provided for, a person can-Minor's acquisition of not, during minority, acquire a new domicile.
- 18. An insane person cannot acquire a new domicile in Lunatic's acquisition of any other way than by his domicile following the domicile of another person.
- Succession to moveable property in British India, in absence of proof of domicile elsewhere.

  19. If a man dies leaving moveable property in British India, in the absence of proof of any domicile elsewhere, succession to the property is regulated by the law of British India.

## PART III. Daniel

#### OF CONSANGUINITY.

- 20. Kindred or consanguinity is the connexion or relation of persons descended from the same stock or common ancestor.
- 21. Lineal consanguinity is that which subsists between two
  Lineal consanguinity.

  persons, one of whom is descended in
  a direct line from the other, as between
  a man and his father, grandfather, and great-grandfather, and so
  upwards in the direct ascending line, or between a man, his son,
  grandson, great-grandson, and so downwards in the direct descending line.

Every generation constitutes a degree, either ascending or descending.

A man's father is related to him in the first degree, and so likewise is his son; his grandfather and grandson in the second degree; his great-grandfather and great-grandson in the third.

Part III. does not apply to Parsis.—See the Parsi Intestate Succession Act (XXI. of 1865), s. 8.

22. Collateral consanguinity is that which subsists between two persons who are descended from the same stock or ancestor, but neither of whom is descended in a direct line from the other.

For the purpose of ascertaining in what degree of kindred any collateral relative stands to a person deceased, it is proper to reckon upwards from the person deceased to the common stock, and then downwards to the collateral relative, allowing a degree for each person, both ascending and descending.

28. For the purpose of succession, there is no distinction.

Persons held for purpose of succession to be similarly related to deceased.

between those who are related to him through his mother;

nor between those who are related to him by the full blood and those who are related to him by the half-blood;

nor between those who were actually born in his lifetime and those who, at the date of his death, were only conceived in the womb, but who have been subsequently born alive.

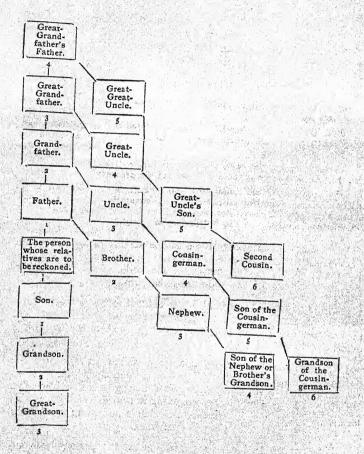
24. In the annexed table of kindred, the degrees are computed Mode of computing deas far as the sixth, and are marked by numeral figures.

The person whose relatives are to be reckoned, and his cousingerman or first cousin, are, as shown in the table, related in the fourth degree; there being one degree of ascent to the father and another to the common ancestor, the grandfather; and from him one of descent to the uncle, and another to the cousin-german; making in all four degrees.

A grandson of the brother and a son of the uncle, i.e., a greatnephew and a cousin-german, are in equal degree, being each four degrees removed.

A grandson of a cousin-german is in the same degree as the grandson of a great-uncle, for they are both in the sixth degree of gindred.

## TABLE OF CONSANGUINITY.



## PART IV.

#### OF INTESTACY.

25. A man is considered to die intestate in respect of all pro-As to what property deceased considered to have mentary disposition which is capable of taking effect.

#### Illustrations.

(a) A has left no will: He has died intestate in respect of the whole of his property.

(b) A has left a will, whereby he has appointed B his executor; but the will contains no other provisions: A has died intestate in respect of the distribution of his property.

(c) A has bequeathed his whole property for an illegal purpose: A has died intestate in respect of the distribution of his property.

(d) A has bequeathed 1.000l. to B and 1,000l. to the eldest son of C. and has made no other bequest; and has died leaving the sum of 2,000l. and no other property. C died sfore A without having ever had a son: A has died intestate in respect of ne distribution of 1,000l.

26. Such property devolves upon the wife or husband, or upon

Devolution of such prothose who are of the kindred of the deceased, in the order and according to
the rules herein prescribed.

Explanation.—The widow is not entitled to the provision hereby made for her if, by a valid contract made before her marriage, she has been excluded from the distributive share of her husband's estate.

Where the intestate has left a widow, if has also left widow and lineal descendants, or widow and kindred only, or widow and no kindred.

27. Where the intestate has left a widow, if has also left any lineal descendants, one-third of his property shall belong to his widow; and the remaining two-thirds shall go to his lineal descendant's according to the rules herein contained.

If he has left no lineal descendant but has left persons who are of kindred to him, one-half of his property shall belong to his widow,

<sup>\*</sup> Part IV. (excepting s. 25) does not apply to Parsis.—See the Parsi Intestate Succession Act (XXI, of 1865), s. 8.

and the other half shall go to those who are of kindred to him in the order and according to the rules herein contained.

If he has left none who are of kindred to him, the whole of his property shall belong to his widow.

28. Where the intestate has left no widow, his property shall where intestate has left go to his lineal descendants or to those no widow, and where he has left no kindred. Who are of kindred to him, not being lineal descendants, according to the rules herein contained; and, if he has left none who are of kindred to him it shall go to the Crown.

#### PART V.\*

#### OF THE DISTRIBUTION OF AN INTESTATE'S PROPERTY:

(a) - Where he has left Lineal Descendants.

- 22. The rules for the distribution of the intestate's property
  (after deducting the widow's share, if he
  has left a widow) amongst his lineal descendants are as follow:—
- 30. Where the intestate has left surviving him a child or where intestate has left children, but no more remote lineal deschild or children only: cendant through a deceased child, the property shall belong to his surviving child if there be only one, or shall be equally divided among all his surviving children.
- . 81. Where the intestate has not left surviving him any child, where intestate has left but has left a gra dchild or grand-no child, but grandchild or children, and no more remote descendant through a deceased grandchild, the property shall belong to his surviving grandchild if there be only one, or shall be equally divided among all his surviving grandchildren.

#### Illustrations.

(a) A has three childen, and no more—John, Mary, and Henry, They all die before the father, John leaving two children. Mary three, and Henry four. Afterwards A dies intestate, leaving those nine grand-children and no descendant of any deceased grandchild: Each of his grandchildren shall have one-ninth.

<sup>\*</sup> Part V. does not apply to Parsis,—See the Parsi Intestate Succession Act (XXI. of 1865), s. 8.

- (b) But, if Henry has died leaving no child, then the whole is equally divided between the intestate's five grandchildren—the children of John and Marv.
- (c) A has two children, and no more—John and Mary. John dies before his father, leaving his wife pregnant. Then A dies, leaving Mary surviving him, and in due time a child of John is born. A's property is to be equally divided between Mary and such posthumous child.
- 32. In like manner the property shall go to the surviving lineal descendants who are nearest in Where intestate has left only great-grandchildren or degree to the intestate, where they are remoter lineal descendants. all in the degree of great-grandchildren to him, or are all in a more remote degree.
- Where intestate leaves lineal descendants not all in same degree of kindred to him, and those through whom the more remote descend are dead.

33. If the intestate has left lineal descendants who do not all stand in the same degree of kindred to him, and the persons through whom the more remote are descended from him are dead, the property shall be divided into such a number of equal shares as may correspond with the

number of the lineal descendants of the instestate who either stood in the nearest degree of kindred to him at his decease, or, having been of the like degree of kindred to him, died before him, leaving lineal descendants who survived him; and

one of such shares shall be allotted to each of the lineal descendants who stood in the nearest degree of kindred to the intestate at his decease; and

one of such shares shall be allotted in respect of each of such deceased lineal descendants; and

the share allotted in respect of each of such deceased lineal descendants shall belong to his surviving child or children or more remote lineal descendants, as the case may be; such surviving child or children or more remote lineal descendants always taking the share which his or their parent or parents would have been entitled to respectively if such parent or parents had survived the intestate.

#### Illustrations.

(a) A had three children, John, Mary and Henry. John died leaving four children, and Mary died leaving one, and Henry alone survived the father: On the death of A intestate, one-third is allotted to Henry, one-third to John's four children, and the remaining third to Mary's one child.

- (b) A left no child, but left eight grandchildren, and two children of a deceased grandchild: The property is divided into nine parts, one of which is alletted to each grandchild; and the remaining one-ninth is equally divided between the two great grandchildren.
- (c) A has three children, John, Mary, and Henry. John dies leaving four children, and one of John's children dies leaving two children. Mary dies leaving one child. A afterwards dies intestate: One-third of his property is allotted to Henry; one-third to Mary's child; and one-third is divided into four parts, one of which is allotted to each of John's three surviving children, and the remaining part is equally divided between John's two grandchildren.

#### (b). - Where the Intestate has left no Lineal Descendants.

Rules of distribution rules for the distribution of his property where intestate has left no leneal descendants, the rules for the distribution of his property where intestate has left no leneal descendants, the rules for the distribution of his property (after deducting the widow's share if he has left a widow) are as follow:—

Where intestates's father living.

35. If the intestate's father be living, he shall succeed to the property.

88. If the intestate's father is dead, but the intestate's mother where intestate's father is living, and there are also brothers or dead, but his mother, brosisters of the intestate living, and there there and sisters living. Is no child living of any deceased brother or sister, the mother and each living brother or sister shall succeed to the property in equal shares.

#### Illustration.

A dies intestate survived by his mother and two brothers of the full blood. Jhon and Henry, and a sister Mary, who is the daughter of his mother, but not of his father: The mother takes one-fourth each brother takes one-fourth, and Mary, the sister of half-blood, takes one-forth.

37. If the instestate's father is dead, but the instestate's mother

Where intestate's father dead, and his mother, a brother or sister, and children of any deceased brother or sister, living.

is living, and if any brother or sister, and the child or children of any brother or sister who may have died in the intestate's lifetime, are also living, then the mother and each living brother

or sister, and the living child or children of each deceased brother or sister, shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

# Illustration

A, the intestate, leaves his mother, his brothers, John and Henry, and also one child of a deceased sister Mary, and two children of George, a deceased brother of the half blood, who was the son of his father, but not of his mother: The mother takes one-fifth, John and Henry each take one-fifth, the child of Mary takes one-fifth, and the two children of George divide the remaining one-fifth equally between them.

Where intestate's father is dead, but the intestate's mother dead, and his mother and are all de d, but all or any of them children of any deceased brother or sister living.

children of each deceased brother or sister shall be entitled to the property in equal shares, such children (if more than one taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

# Illustration.

A, the intestate, leaves no brother or sister, but leaves his mother and one child of a deceased sister Mary, and two children of a deceased brother George. The mother takes one-third, the child of Mary takes one-third, and the children of George div ide the remaining one-third equally between them.

39. If the in estate's father is dead, but the intestate's mother where intestate's father is living, and there is neither brother dead, but his mother living, and no brother, sister, and no brother, sister, sister of the intestate, the property shall belong to the mother.

40. Where the intestate has left neither lineal descendant Where intestate has left nor father, nor mother, the property is neither lineal descendant, divided equally between his brothers nor father, nor mother.

and sisters and the child or children of such of them as may have died before him, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

Where intestate has left nor brother, nor sister, his property shall be divided equily among those or sister.

The parent, nor brother, nor sister, his property shall be divided equily among those of his relatives who are in the nearest degree of kindred to him.

## Illustrations.

- (a) A, the intestate, has left a grandfather and a grandmother, and no other relative standing in the same or a nearer degree of kindred to him. They, being in the second degree, will be entitled to the property in equal shares, exclusive of any uncle or aunt of the intestate, uncles and aunts being only in the third degree.
- (b) A, the intestate, has left a great-grandfather or great-grandmother and uncles and aunts, and no other relative standing in the same or a nearer degree of kindred to him: All of these, being in the third degree, shall take equal shares.
- (c) A, the intestate, left a great grandfather, and uncle and a nephew, but no relative standing in a nearer degree, of kindred to him: All of these, being in the third degree, shall take equal shares.
- (d) Ten children of one brother or sister of the intestate, and one child of another brother or sister of the intestate, constitute the class of relatives of the nearest degree of kindred to him. They shall each take
- 42. Where a distributive share in the property of a person who Children's advancements has died intestate shall be claimed by a not brought into hotchpot. child, or any descendant of a child, of such person, no money or other property which the intestate may, during his life, have paid, given, or settled to, or for the advancement of the child by whom or by whose descendant the claim is made, shall be taken into account in estimating such distributive share.

# PART VI.

# OF THE EFFECT OF MARRIAGE AND MARRIAGE-SETTLEMENTS. ON PROPERTY.

- 48.\* The husband surviving his wife has the same rights in Rights of widower and respect of her property if she die intestate as the widow has in respect of her husband's property if he die intestate.
- 44. If a person whose domicile is not in British India marries

  Effect of marriage between in British india a person whose domicile person domiciled, and one not domiciled, in British by the marriage any rights in respect of any property of the other party not com-

S. 43 does not apply to Parsis.—See the Parsi Intestate Succession Ac(XXI. of 1865), s. 8.

prised in a settlement made previous to the marriage, which he or she would not acquire thereby if both were domiciled in British India at the time of the marriage.

45. The property of a minor may be settled in contemplation

Settlement of minor's property in contemplation of marriage, provided the settlement be made by the minor with the approbation of the minor's father, or if he be dead or absent from British India, with the approbation of the High Court.

# PART VII.\*

## OF WILLS AND CODIEILS.

Persons capable of making wills. 46. Every person of sound mind and not a minor may dispose of his property by will.

Explanation 1.—A married woman may dispose by will of any property which she could alienate by her own act during her life.

Explanation 2.—Persons who are deaf, or dumb, or blind, are not thereby incapacitated for making a will if they are able to know what they do by it.

Explanation 3.—One who is ordinarily insane may make a will during an interval in which he is of sound mind.

Explanation 4.—No person can make a will while he is in such a state of mind, whether arising from drunkenness, or from illness from any other cause, that he does not know what he is doing.

- (a) A can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property or the persons who are of kindred to him, or in whose favour it would be proper that he should make his will: A cannot make a valid will.
- (b) A executes an instrument purporting to be his will, but he does not understand the nature of the instrument, nor the effect of its provisions: This instrument is not a valid will.
- (c) A, being very feeble and debilitated, but capable of exercising a judgment as to the proper mode of disposing of his property, makes a will: This is a valid will.

<sup>\*</sup> Of Part VIL, ss. 46, 48, and 49 apply to the wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay.—See the Hindu Wills Act (XXI. of 1870), s. 2.

- 47. A father, whatever his age may be, may, by will appoint a Testamentary guardian. guardian or guardians for his child during minority
- 48. A will or any part of a will, the making of which has been Will obtained by fraud, caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.

- (a) A falsely and knowingly represents to the testator that the testator's only child is dead or that he has done same undutifulact, and thereby induces the testator to make a will in his (A's) favour, such will has been obtained by fraud, and is invalid.
- (δ) A by fraud and deception, prevails upon the testator to bequeath a legacy to him: The bequest is void.
- (c) A, being a prisoner by lawful authority, makes his will. The will is not invalid by reason of the imprisonment.
- (d) A threatens to shoot B, or to burn his house, or to cause him to be arrested on a criminal charge unless he makes a bequest in favour of C, B, in consequence, makes a bequest in favour of C: The bequest is void, the making of it having been caused by coercion.
- (e) A being of sufficient intellect, if undisturbed by the influence of others to make a will, yet being so such under the control of B that he is not a free agent, makes a will dictated by B. It appears that he would not have executed the will but for fear of B: The will is invalid.
- (f) A, being in so feeble a state of health as to be unable to resist importunity, is pased by B to make a will of a certain purport, and does so merely to purchase peace, and in submission to B: The will is invalid.
- (g) A being in such a state of health as to be capable of exercising his own judgment and volition, B use urgent intercession and persuasion with him to induce him to make a will of a certain purport. A in consequence of the intercession, and persuasion, but in the free exercise of his judgment and volition, makes his will in the manner recommended by B. The will be not rendered invalid by the intercession and persuasion of B.
- (h) A, with a view to obtaining a legacy from B, pays him attention and flatters him, and thereby produces in him a capricious partiality to A, B, in consequence of such attention and flattery, makes his will, by which he leaves a legacy to A: The bequest is not rendered invalid by the attention and flattery of A.
- 49. A will is liable to be revoked or altered by the maker of will may be revoked or it at any time when he is competent to dispose of his property by will:

non-setting

## PART VIII.\*

# OF THE EXECUTION OF UNPRIVILEGED WILLS.

50. Every testator, not being a soldier employed in an ex-Execution of Unprivileged pedition or engaged in actual warfare or wills. a mariner at sea, must execute his will according to the following rules:—

First.—The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

Second.—The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

Third.—The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the will in the presence of the testator,† but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

51. If a testator, in a will or codicil duly attested, refers to incorporation of papers any other document then actually written, as expressing any part of his intentions, such documents shall be considered as forming a part of the will or codicil in which it is referred to.

# PART IX.

# OF PRIVILEGED WILLS.

52. Any soldier being employed in an expidition, or engaged in actual warfare, or any mariner being at sea, may, if he has completed the age

† 3 N. W. P. 35

<sup>\*</sup> Part VIII. applies to the wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay.—See the Hindu Wills Act (XXI. of 1870), s. 2.

of eighteen years, dispose of his property by a will made as is mentioned in section 53.

Such wills are called privileged wills.

## Illustrations.

- (a) A, the surgeon of a regiment, is actually employed is an expedition. He is a soldier actually employed in an expedition, and can make a privileged will.
- (b) A is at sea in a merchant-ship, of which he is the purser. He is a mariner, and, being at sea can make a privileged will.
- (c) A, a soldier, serving in the field against insurgents, is a soldier engaged in actual warfare, and as such can make a privileged will.
- (d) A, a mariner of a ship in the course of a voyage, is temporarily on shore while she is lying in harbour. He is, in the sense of the words used in this clause, a mariner at sea, and can make a privileged will.
- (e) A, an admiral who commands a naval force, but who lives on shore, and only occasionally goes on board his ship, is not considered as at sea, and cannot make a privileged will.
- (f) A mariner serving on a military expedition, but not being at sea, is considered as a soldier, and can make a privileged will.

Mode of making, and rules for executing, privileged wills may be in writing, or may be made by word of mouth.

The execution of them shall be governed by the following rules:—

First.—The will may be written wholly by the testator with his own hand. In such case it need not be signed nor attested.

Second.—It may be written wholly or in part by another person, and signed by the testator. In such case it need not be attested.

Third.—If the instrument purporting to be a will is witten wholly or in part by another person, and is not signed by the testator, it shall be considered to be his will if it be shown that it was written by the testator's directions, or that he recognized it as his will.

If it appear on the face of the instrument that the execution of it in the manner intended by him was not completed, the instrument shall not, by reason of that circumstance, be invalid, provided that his non-execution of it can be reasonably ascribed to some cause other than the abandonment of the testamentary intentions expressed in the instrument.

Fourth.—If the soldier or mariner shall have written instructions for the preparation of his will, but shall have died before it could be prepared and executed, such instructions shall be considered to constitute his will.

Fifth.—If the soldier or mariner shall, in the presence of two witnesses, have given verbal instructions for the preparation of his will, and they shall have been reduced into writing in his lifetime, but he shall have died before the instrument could be prepared and executed, such instructions shall be considered to constitute his will, although they may not have been reduced into writing in his presence, not read over to him.

Sixth.—Such soldier or mariner as aforesaid may make a will by word of mouth by declaring his intentions before two witnesses present at the same time.

Seventh .- A will made by word of mouth shall be null at the expiration of one month after the testator shall have ceased to be entitled to make a privileged will.

# PART X.\*

OF THE ATTESTATION, REVOCATION, ALTERATION, AND REVIVAL OF WILLS.

54. A will shall not be considered as insufficiently attested by Effect; of gift to attesting reason of any benefit thereby given, either by way of bequest or by way of appointwitness. ment, to any person attesting it, or to his or her wife or husband:

but the bequest or appointment shall be void so far as concerns the person so attesting, or the wife or husband of such person, or any person claiming under either of them.

Explanation -A legatee under a will does not lose his legacy by attesting a codicil which confirms the will.

by interest or by being ex-

55. No person, by reason of interest in, or of his being an Witness not disqualified executor of, a will, is disqualified as a witness to prove the execution of the will, or to prove the validity or invalidity thereof.

<sup>\*</sup> Of Part X., ss. 55 and 57 to 60 (both inclusive) apply to the wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay. - See the Hindu Wills Act (XXI. of 1870), s 2.

So. Every will shall be revoked by the marriage of the maker Revocation of will by except a will made in exercise of a testator's marriage.

power of appointment, when the property over which the power of appointment is exercised would not, in default of such appointment, pass to his or her executor or administrator, or to the person entitled in case of intestacy.

Explanation.—Where a man is invested with power to deterpower of appointment mine the disposition of property of which defined. he is not the owner, he is said to have power to appoint such property.

From the manner in which an unprivileged will or codicil, nor any part thereof, shall the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

- (a) A has made an unprivileged will. Afterwards A makes another unprivileged will which purports to revoke the first. This is a revocation.
- (b) A has made an unprivileged will. Afterwards A, being entitled to make a privileged will, makes a privileged will, which purports to revoke his unprivileged will. This is a revocation.
- 58. No obliteration, interlineation, or other alteration made Effect of obliteration, in in any unprivileged will after the executerlineation, or alteration in tion thereof shall have any effect, except unprivileged will.

  so far as the words or meaning of the will shall have been thereby rendered illegible or undiscernible, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; save that the will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the will.
- 59. A privileged will or codicil may be revoked by the testa-Revocation of privileged tor by an unprivileged will or codicil, or by any act expressing an intention to

revoke it, and accompanied with such formalities as would be sufficient to give validity to a privileged will, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Explanation.—In order to the revocation of a privileged will or codicil by an act accompanied with such formalities as would be sufficient to give validity to a privileged will it is not necessary that the testator should, at the time of doing that act, be in a situation which entitles him to make a privileged will.

Revival of unprivileged will or codicil, nor any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner herein-before required, and showing an intention to revive the same;

and when any will or codicil which shall be partly revoked,
Extent of revival of will and afterwards wholly revoked, shall be
or codicil partly revoked, revived such revival shall not extend to
so much thereof as shall have been revoked.

thereof, unless an intention to the contrary shall be shown by the will or codicil.

# PART XI.\*

# OF THE CONSTRUCTION OF WILLS.

- Wording of will.

  Wording of the testator can be known therefrom.
- 62. For the purpose of determining questions as to what Enquiries to determine person or what property is denoted by object or any words used in a will, a Court must enquire into every material fact relating to the persons who claim to be interested under such will, the property which is claimed as the subject of disposition, the circum-

<sup>\*</sup> Of Part XI., ss 61-77 (both inclusive), 82, 83, 85, and 88 to 98 (both inclusive), apply to the wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay,—See the Hindu Wills Act (XXI, of 1870), s. 2.

stances of the testator and of his family, and into every fact, a knowledge of which may conduce to the right application of the words which the testator has used.

#### Illustrations.

- (a) A, by his will, bequeaths 1,000 rupees to his eldest son,\* or to his youngest grandchild, or to his cousin Mary. A Court may make inquiry in order to ascertain to what person the description in the will applies.
- (b) A, by his will, leaves to B "his estate called Black Acre." It may be necessary to take evidence in order to ascertain what is the subject-matter of the bequest; that is to say, what estate of the testator's is called Black Acre.
- (c) A, by his will, leaves to B, "the estate which he purchased of C." It may be necessary to take evidence in order to ascertain what estate the testator purchased of C.
- 63. Where the words used in the will to designate or describe a

  Misnomer or mis-description of object.

  legatee, or a class of legatees, sufficiently
  show what is meant, an error in the
  name or description shall not prevent the legacy from taking effect.

A mistake in the name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by the name.

- (a) A bequeaths a legacy "to Thomas, the second son of his brother John." The testator has an only brother, named John, who has no son named Thomas but has a second son whose name is William. William shall have the legacy.
- (b) A bequeaths a legacy "to Thomas, the second son of his brother John." The testator has an only brother, named, John whose first son is named Thomas, and whose second son is named William. Thomas shall have the legacy.
- (c) The testator bequeaths his property "to A and B, the legitimate children of C." C has no legitimate child, but has two illegitimate children, A and B. The bequest to A and B takes effect, although they are illegitimate.

<sup>\*</sup> In applying ss. 62, 63, 92, 96, 98, 99, 100, 101, 102, and 103 of the said Succession Act to wills and codicils made under this Act (XXI. of 1870), the words, "son," "sons," "child," and "children," shall be deemed to include an adopted child; and the word "grandchildren" shall be deemed to include the children, whether adopted or natural-born, of a child whether adopted or natural-born; and the expression, "daughter-in-law" shall be deemed to include the wife of an adopted son.—Hindu Wills Act XXI. of 1870), s. 6.

- (d) The testator gives his residuary estate to be divided among "hisseven children,"\* and, proceeding to enumerate them, mentions six names only. The omission shall not prevent the seventh child from taking a share with the others.
- (e) The testator, having six grandchildren,\* makes a bequest to "his six grandchildren," and, proceeding to mention them by their Christian names, mentions one twice over, omitting another altogether. The one whose name is not mentioned shall take a share with the others.
- (f) The testator bequeaths "1,000 rupees to each of the three children\* of A." At the date of the will, A has four children. Each of these four children shall, if he survives the testator, receive a legacy of 1,000 rupees.
- 64. Where any word material to the full expression of the When words may be supposed meaning has been omitted, it may be supplied by the context.

## Illustration.

The testator gives a legacy of "five hundred" to his daughter A, and a legacy of "five hundred rupees" to his daughter B. A shall take a legacy of five hundred rupees.

65. If the thing which the testator intended to bequeath can Rejection of erroneous be sufficiently identified from the desparticulars in description of cription of it given in the will, but some parts of the description do not apply, such parts of the description shall be rejected as erroneous, and the bequest shall take effect.

- (a) A bequeaths to B, "his marsh-lands lying in L, and in the occupation of X." The testator had marsh-lands lying in L, but has no marsh-lands in the occupation of X. The words "in the occupation of X" shall be rejected as erroneous, and the marsh-lands of the testator lying in L shall pass by the bequest.
- (b) The testator bequeaths to A "his zemindari of Rampur." He had an estate at Rampur, but it was a taluq, and not a zemindari. The taluq passes by this bequest.
- When part of description of the thing which the testator intends to bequeath, and there is any property of his in respect of which all those circumstances exist, the bequest shall be considered as limited to such pro-

<sup>\*</sup> See the Hindu Wills Act (XXI. of 1870), s. 6 (reproduced at foot-acte of p. 23, supra.)

perty, and it shallif not be lawful to reject any part of the description as erroneous, because the testator had other property to which such part of the description does not apply.

Explanation.—In judging whether a case falls within the meaning of this section, any words which would be liable to rejection under section 65, are to be considered as struck out of the will.

#### Illustrations.

- (a) A bequeaths to B "his marsh-lands lying in L, and the occupation of X." The testator had marsh-lands lying in L, some of which were in the occupation of X, and some not in the occupation of X. The bequest shall be considered as limited to such of the testator's marsh-lands lying in L as were in the occupation of X.
- (b) A bequeaths to B "his marsh-lands lying in L, and in the occupation of X, comprising 1,000 bighas of land." The testator had marsh-lands lying in L, some of which were in the occupation of X, and some not in the occupation of X. The measurement is wholly inapplicable to the marsh-lands of either class, or to the whole taken together. The measurement shall be considered as struck out of the will, and such of the testator's marsh-lands lying in L as were in the occupation of X shall alone pass by the bequest.
- 67. Where the words of the will are unambiguous, but it is

  Extrinsic evidence admissible in cases of latent ambiguity. can have been intended by the testator,
  extrinsic evidence may be taken to show which of these applications
  was intended.

- (a) A man, having two cousins of the name of Mary, bequeaths a sum of money to "his cousin Mary." It appears that there are two persons, each answering the description in the will. That description, therefore, admits of two applications, only one of which can have been intended by the testator. Evidence is admissible to show which of the two applications was intended.
- (b) A, by his will, leaves to B "his estate called Sultanpur Khurd." It turns out that he had two estates called Sultanpur Khurd: Evidence is admissible to show which estate was intended.
- 68. Where there is an ambiguity or deficiency on the face Extrinsic evidence inad- of the will, no extrinsic evidence as to missible in cases of patent the intentions of the testator shall be admitted.

#### Illustrations

- (a) A man has an aunt Caroline and a cousin Mary, and has no aunt of the name of Mary. By his will he bequeaths 1,000 rupees to "his aunt Caroline" and 1,000 rupees to "his cousin Mary," and afterwards, bequeaths 2,000 rupees to "his before-mentioned aunt Mary." There is no person to whom the description given in the will can apply, and evidence is not admissible to show who was meant by "his before-mentioned aunt Mary." The bequest is therefore void for uncertainty under section 76.
- (b) A bequeaths 1,000 rupees to , leaving a blank for the name of the legatee. Evidence is not admissible to show what name the testator intended to insert.
- (c) A bequeaths to B rupees, or "his estate of ." Evidence is not admissible to show what sum or what estate the testator intended to insert.
- 69. The meaning of any clause in a will is to be collected

  Meaning of clause to be from the entire instrument, and all its
  collected from entire will. parts are to be construed with reference
  to each other; and for this purpose a codicil is to be considered as
  part of the will.

## Illustrations.

- (a) The testator gives to B a specific fund or property at the death of A, and, by a subsequent clause, gives the whole of his property to A. The effect of the several clauses taken together is to vest the specific fund or property in A for life, and after his decease in B; it appearing from the bequest to B that the testator meant to use, in a restricted sense, the words in which he describes what he gives to A.
- (b) Where a testator, having an estate, one part of which is called Black Acre, bequeaths the whole of his estate to A, and in another part of his will bequeaths. Black Acre to B, the latter bequest is to be read as an exception out of the first, as if he had said "I give Black Acre to B, and all the rest of my estate to A."
- 70. General words may be understood in a restricted sense

  When words may be unwhere it may be collected from the will derstood in restricted sense, that the testator meant to use them in a restricted sense; and words may be understood in a wider sense than that which they usually bear where it may be collected from the other

which they usually bear where it may be collected from the other words of the will that the testator meant to use them in such wider sense.

#### Illustrations.

(a) A testator gives to A "his farm in the occupation of B," and to C "all his marsh lands in L." Part of the farm in the occupation of B "consists of marsh-lands in L, and the testator also has other marsh-lands in

- L. The general words, "all his marsh-lands in L," are restricted by the gift to A. A takes the whole of the farm in the occupation of B, including that portion of the farm which consists of marsh-lands in L.
- (b) The testator (a sailor on ship-board) bequeathed to his mother his gold ring, buttons, and chest of clothes, and to his friend A (a ship-mate) his red box, clasp knife, and all things not before bequeathed. The testator's share in a house does not pass to A under this bequest.
- (c) A, by his will, bequeathed to B all his house-hold furniture, plate, linen, china, books, pictures and all other goods of whatever kind; and afterwards bequeathed to B a specified part of his property. Under the first bequest, B is entitled only to such articles of the testator's as are of the same nature with the articles therein enumerated.
- 71. Where a clause is susceptible of two meanings, accord—
  Which of two possible ing to one of which it has some effect,
  constructions preferred. and according to the other it can have
  none, the former is to be preferred.
- 72. No part of a will is to be rejected as destitute of mean-No part rejected if it can ing if it is possible to put a reasonable be reasonably construed. construction upon it.
- 78. If the same words occur in different parts of the same literpretation of words will, they must be taken to have been used everywhere in the same sense, unless there appears an intention to the contrary.
- 74. The intention of the testator is not to be set aside, because it cannot take effect to the full extent, but effect is to be given to it as far as possible.

#### Illustration.

The testator, by a will made on his death-bed, bequeathed all his property to C D for life, and after his decease to a certain hospital. The intention of the testator cannot take effect to its full extent, because the gift to the hospital is void under section 105, but it shall take effect so far as regards the gift to C D.

75. Where two clauses or gifts in a will are irreconcileable,
The last of two inconsist- so that they cannot possibly stand toent clauses prevails.

gether, the last shall prevail.

## Illustrations.

(a) The testator, by the first clause of his will, leaves his estate of Ramnagar "to A," and, by the last clause of his will, leaves it "to B, and not to A." B shall have it.

(b) If a man, at the commencement of his will, gives his house to A, and at the close of it directs that his house shall be sold, and the proceeds invested for the benefit of B, the latter disposition shall prevail.

Will or bequest void for uncertainty. 76. A will or bequest not expressive of any definite intention is void for uncertainty.

#### Illustration.

If a testator says, "I bequeath goods to A;" or "I bequeath to A;" or "I leave to A all the goods mentioned in a schedule," and no schedule is found; or, "I bequeath 'money' 'wheat,' 'oil,'." or the like, without saying how much, this is void.

77. The description contained in a will of property, the subject of gift, shall unless a contrary intention appear by the will, be deemed to refer to and comprise the property answering that description at the death of the testator.

78. Unless a contrary intention shall appear by the will, a Power of appointment bequest of the estate of the testator shall executed by general bequest. be construed to include any property which he may have power to appoint by will to any object he may think proper, and shall operate as an execution or such power;

and a bequest of property described in a general manner shall be construed to include any property to which such description may extend, which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power.

79. Where property is bequeathed to or for the benefit of Implied gift to objects of such of certain objects as a specified power in default of appoint person shall appoint, or for the benefit of certain objects in such proportions as a specified person shall appoint, and the will does not provide for the event of no appointment being made, if the power given by the will be not exercised, the property belongs to all the objects of the power in equal shares.

#### Illustration.

A, by his will, bequeaths a fund to his wife for her life, and directs that, at her death, it shall be divided among his children in such proportions as she shall appoint. The widow dies without having made an appointment. The fund shall be divided equally among the children.

Bequest to "heirs," &c., or "relations," or "nearest relations," or of particular person without "family," or "kindred," or nearest of qualifying terms. "kin," or "next of kin," of a particular person, without any qualifying terms, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person, and he had died intestate in respect of it leaving assets for the payment of his debts independently of such property.

# Illustrations,

- (a) A leaves his property "to his own nearest relations." The property goes to those who would be entitled to it if A had died intestate, leaving assets for the payment of his debts independently of such property.
- (b) A bequeaths 10,000 rupees "to B for his life, and after the death of B to his own right heirs." The legacy after B's death belongs to those who would be entitled to it if it had formed part of A's unbequeathed property.
- (c) A leaves his property to B; but, if B dies before him, to B's next of kin. B dies before A. The property devolves as if it had belonged to B, and he had died intestate, leaving assets for the payment of his debts, independently of such property.
- (a) A leaves 10,000 rupees "to B for his life, and, after his decease to the heirs of C." The legacy goes as if it had belonged to C, and he of the legacy, leaving assets for the payment of his debts independently
- Bequest to "representatives," or "legal representatives," or "personal tives," &c., of particular representatives," or "executors or administrators," of a particular person, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person, and he had died intestate in respect of it.

#### Illustration.

A bequest is made to the "legal representative" of A. A has died intestate and insolvent. B is his administrator. B is entitled to receive the legacy, and shall apply it in the first place to the discharge of such part of A's debts as may remain unpaid: If there he any surplus, B shall pay it to those persons who, at A's death, would have been entitled to receive any property of A's which might remain after payment of his debts, or to the representatives of such persons.

- 82.\* Where property is bequeathed to any person, he is

  Bequest without words of entitled to the whole interest of the

  limitation testator therein unless it appears from
  the will that only a restricted interest was intended for him.
- 83.\* Where property is bequeathed to a person, with a bequest in the alternative to another person or to a class of persons, if a contrary intention does not appear by the will, the legatee first named shall be entitled to the legacy if he be alive at the time when it takes effect; but, if he be then dead, the person or class of persons named in the second branch of the alternative shall take the legacy.

- (a) A bequest is made to A or to B A survives the testator. B takes nothing.
- (b) A bequest is made to A or to B. A dies after the date of the will and before the testator. The legacy goes to B.
- (c) A bequest is made to A or to B. A is dead at the date of the will. The legacy goes to B.
- (d) Property is bequeathed to A or his heirs. A survives the testator. A takes the property absolutely.
- (e) Property is bequeathed to A or his nearest of kin. A dies in the lifetime of the testator. Upon the death of the testator, the bequest to A's nearest of kin takes effect.
- (f) Property is bequeathed to A for life, and after his death to B or his heirs. A and B survive the testator. B dies in A's lifetime. Upon A's death, the bequest to the heirs of B takes effect.
- (g) Property is bequeathed to A for life and after his death to B or his heirs. B dies in the testator's lifetime. A survives the testator. Upon A's death, the bequest to the heirs of B takes effect.
- 84. Where the property is bequeathed to a person, and words are

  Effect of words describing added which describe a class of persons,
  a class added to bequest to but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein unless a contrary intention appears by the will.

<sup>\*</sup>Ss. 82 and 83 apply to the wills of Hindus, &c., in Lower Provinces of Bengal, and in the towns of Madras and Bombay.—See the Hindu Wills Act (XXI of 1870), s. 2.

## Illustrations.

# (a) A bequest is made-

to A and his children.

to A and his children by his present wife,

to A and his heirs,

to A and the heirs of his body,

to A and the heirs male of his body,

to A and the heirs female of his body,

to A and his issue,

to A and his family.

to A and his descendants.

to A and his representative,

to A and his personal representatives,

to A, his executors, and administrators:

In each of these cases, A takes the whole interest which the testator had in the property.

- $(\delta)$  A bequest is made to A and his brothers. A and his brothers are jointly entitled to the legacy.
- (c) A bequest is made to A for life, and after his death to his issue. At the death of A the property belongs in equal shares to all persons who shall then answer the description of issue of A.
- 85.\* Where a bequest is made to a class of persons under a general description only, no one to whom the words of the description are not, in their ordinary sense, applicable shall take the legacy.
- 86. The word "children" in a will applies only to lineal descendants in the first degree, the word "grandchildren" applies only to lineal descendant in the second degree, of the person whose "children" or "grandchildren" are spoken of;

the words "nephews" and "nieces" apply only to children of brothers or sisters;

<sup>\*</sup> S. 85 applies to the wills of Hindus, &c., in the Lower Provinces of Bengal and in the towns of Madras and Bombay.—See the Hindu Wills Act (XXI. of 1870), s. 2.

the words "cousins," or "first cousins," or "cousins-german," apply only to children of brothers or of sisters of the father or mother of the person whose "cousins," or "first-cousins," or "cousins-german" are spoken of;

the words "first cousins once removed" apply only to children of cousins-german, or to cousins-german of a parent of the person whose "first cousins once removed" are spoken of:

the words "second cousins" apply only to grandchildren of brothers or of sisters of the grandfather or grandmother of the person whose "second cousins" are spoken of;

the words "issue" and "descendants" apply to all lineal descendants whatever of the person whose "issue" or "descendants" are spoken of.

Words expressive of collateral relationship apply alike to relatives of full and of half-blood.

All words expressive of relationship apply to a child in the womb who is afterwards born alive.

Words expressing relationship denote only legitimate relatives, or, failing such, relatives reputed legitimate.

87. In the absence of any intimation to the contrary in the will, the term "child," "son," or "daughter," or any word which expresses relationship, is to be understood as denoting only a legitimate relative, or, where there is no such legitimate rela-

tive, a person who has acquired, at the date of the will, the reputation of being such relative.

- (a) A having three children, B, C, and D, of whom B and C are legitimate, and D is illegitimate, leaves his property to be equally divided among "his children." The property belongs to B and C in equal shares to the exclusion of D.
- (b) A having a niece of illegitimate birth, who has acquired the reputation of being his niece, and having no legitimate niece bequeaths a sum of money to his niece. The illegitimate niece is entitled to the legacy.
- (c) A, having in his will enumerated his children, and named as one of them B, who is illegitimate leaves a legacy to "his said children." B will take a share in the legacy along with the legitimate children.
- (d) A leaves a legacy to the "children of B." B is dead, and has left none but illegitimate children All those who had, at the date of the will, acquired the reputation of being the children of B are objects of the gilt.

- (e) A bequeathed a legacy to "the children of B." B never had any legitimate child. C and D had, at the date of the will, acquired the reputation of being children of B. After the date of the will, and before the death of the testator, E and F were born, and acquired the reputation of being children of B. Only C and D are objects of the bequest.
- (f) A makes a bequest in favour of his child by a certain woman, not his wife. B had acquired at the date of the will, the reputation of being the child of A by the woman designated. B takes the legacy.
- (g) A makes a bequest in favour of his child to be born of a woman who never becomes his wife. The bequest is void.
- (h) A makes a bequest in favour of the child of which a certain woman, not married to him, is pregnant. The bequest is valid.
- Rules of construction person, and a question arises whether where will purports to make two bequests to same person. bequests to same person. first, if there is nothing in the will to show what he intended, the following rules shall prevail in determining the construction to be put upon the will:—

First.—If the same specific thing is bequeathed twice to the same legatee in the same will, or in the will, and again in a codicil, he is entitled to receive that specific thing only.

Second.—Where one and the same will or one and the same codicil purports to make, in two places, a bequest to the same person of the same quantity or amount of anything, he shall be entitled to one such legacy only.

Third.—Where two legacies of unequal amount are given to the same person in the same will or in the same codicil, the legatee is entitled to both.

Fourth.—Where two legacies, whether equal or unequal in amount, are given to the same legace, one by a will and the other by a codicil, or each by a different codicil, the legace is entitled to both legacies.

Explanation —In the four last rules, the word "will" does not include a codicil.

#### Illustrations.

(a) A having ten shares, and no more, in the Bank of Bengal, made his will, which contains near its commencement the words. "I bequeath my

<sup>\*</sup> This section and ss. 88-103 (both inclusive) apply to the wills of Hindus, &c., in the Lower Provinces of Bengal and in the towns of Madras and Bombay,—See the Hindu Wills Act (XXI. of 1870), s. 2.

ten shares in the Bank of Bengal to B." After other bequests, the will concludes with the words "and I bequeath my ten shares in the Bank of Bengal to B." B is entitled simply to receive A's ten shares in the Bank of Bengal.

- (b) A, having one diamond ring which was given him by B, bequeathed to C the diamond ring which was given him by B. A afterwards made a codicil to his will, and the reby, after giving other legacies, he bequeathed to C the diamond ring which was given him by B. C can claim nothing except the diamond ring which was given to A by B.
- (c) A, by his will, bequeaths to B the sum of 5,000 rupees, and afterwards, in the same will requests the bequest in the same words. B is entitled to one legacy of 5,000 rupees only.
- (d) A, by his will bequeaths to B the sum of 5,000 rupees, and afterwards, the same will, bequeaths to B the sum of 6,000 rupees. B is entitled to 11,000 rupees.
- (e) A, by his will, bequeaths to B 5,000 rupees, and by a codicil to the will he bequeaths to him 5,000 rupees. B is entitled to receive 10,000 rupees.
- (f) A, by one codicil to his will, bequeaths to B 5,000 rupees, and by another codicil bequeaths to him 6,000 rupees. B is entitled to receive 11,000 rupees.
- (e. A, by his will, bequeaths "500 rupees to B, because she was his nurse" and in another part of the will bequeaths 500 rupees to B, because she went to England with his children." B is entitled to receive 1,000 rupees.
- (h) A, by his will, bequeaths to B the sum of 5,000 rupees, and also in another part of the will, an annuity of 400 rupees. B is entitled to both legacies.
- (i) A, by his will, bequeaths to B the sum of 5,000 rupees, and also bequeaths to him the sum of 5,000 rupees if he shall attain the age of 18. B is entitled absolutely to one sum of 5,000 rupees, and takes a contingent interest in another sum of 5,000 rupees.
- 89. A residuary legatee may be constituted by any words

  Constitution of residuary that show an intention on the part of the legatee.

  testator that the person designated shall take the surplus or residue of his property.

- (a) A makes her will consisting of several testamentary papers, in one of which are contained the following words: "I think there will be something left, after all funeral expenses, &c., to give to B now at school, towards equipping him to any profession he may hereafter be appointed to "B is constituted residuary legatee.
- (b) A makes his will with the following passage at the end of it: "I believe there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire B to do, and keep the residue for her own use and pleasure," B is constituted the residuary legates.

- (c) A bequeaths all his property to B, except certain stocks and funds which he bequeaths to C. B is the residuary legates.
- Property to which resi- property belonging to the testator at the duary legatee entitled: time of his death of which he has not made any other testamentary disposition which is capable of taking effect.

## Illustration.

A, by his will, bequeaths certain legacies, one of which is void under section 105, and another lapses by the death of the legatee. He bequeaths the residue of his property to B. After the date of his will, A purchases a zemindari which belongs to him at the time of his death. B is entitled to the two legacies and the zemindari as part of the residue.

- 91. If a legacy be given in general terms, without specifying
  Time of vesting of legacy the time when it is to be paid, the legatee
  in general terms. has a vested interest in it from the day
  of the death of the testator, and, if he dies without having received
  it, it shall pass to his representatives.
- 92. If the legatee does not survive the testator, the legacy in what case legacy lapses. cannot take effect, but shall lapse and form part of the residue or the testator's property, unless it appear by the will that the testator intended that it should go to some other person.

In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.

- (a) The testator bequeaths to B "500 rupees which B owes him." B dies before the testator. The legacy lapses.
- (b) A bequest is made to A and his children.\* A dies before the testator, or happens to be dead when the will is made. The legacy to A and his children lapses.
- (c) A legacy is given to A, and, in case of his dying before the testator to B. A dies before the testator. The legacy goes to B.
- (d) A sum of money is bequeathed to A for life, and after his death to B. A dies in the lifetime of the testator; B survives the testator. The bequest to B takes effect.

<sup>\*</sup> See the Hindu Wills Act (XXI. of 1870), s. 6 (which is reproduced as foot-note at p. 23, supra).

- (e) A sum of money is bequeathed to A on his completing his eighteenth year, and in case he should die before he completes his eighteenth year, to B. A completes his eighteenth year, and dies in the lifetime of the testator. The legacy to A lapses, and the bequest to B does not take effect.
- (f) The testator and the legatee perished in the same shipwreck. There is no evidence to show which died first. The legacy will lapse.

Legacy does not lapse if one of two joint legatees die before testator.

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98. If a legacy be given to two persons jointly, and one of them die before the testator, the other legatee takes the whole.

## Illustration.

The legacy is simply to A and B. A dies before the testator. B takes the legacy.

But, where a legacy is given to legatees in words which showing show that the testator intended to give testator's intention to give them distinct shares. It is gated die before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.

## Illustration.

A sum of money is bequeathed to A, B, and C, to be equally divided among them. A dies before the testator. B and C shall only take so much as they would have had if A had survived the testator.

95. Where the share that lapses is a part of the general resi-When lapsed share goes due bequeathed by the will, that share as undisposed of.

#### Illustration.

The testator bequeaths the residue of his estate to A, B, and C, to be equally divided between them. A dies befere the testator. His one-third of the residue goes as undisposed of.

When bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime. of the testator, but any lineal descendant of his shall survive the testator, the be-

<sup>\*</sup> See the Hindu Wills Act (XXI. of 1870), s. 6 (which is reproduced as foot-note at p. 23, supra).

quest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator unless a contrary intention shall appear by the will.

## Illustration.

A makes his will, by which he bequeaths a sum of money to his so n B for his own absolute use and benefit. B dies before A, leaving a son C who survives A, and having made his will, whereby he bequeaths all his property to his widow D. The money goes to D.

- Bequest to A for benefit another, the legacy does not lapse by the death.

  Bequest to A for benefit another, the legacy does not lapse by the death, in the testator's lifetime, of the person to whom the bequest is made.
- 98. Where a bequest is made simply to a described class of Survivorship in case of persons, the thing bequeathed shall go bequest to described class. only to such as shall be alive at the testator's death.

Exception.—If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise, the property shall at that time go to such of them as shall be then alive, and to the representatives of any of them who have died since the death of the testator.

- (a) A bequeaths 1,000 rupees to "the children" of B without saying when it is to be distributed among them. B had died previous to the date of the will leaving three children, C, D, and E, E died after the date of the will, but before the death of A. C and D survive A. The lagacy shall belong to C and D to the exclusion of the representatives of E.
- (b) A bequeaths a legacy to the children\* of B. At the time of the testator's death, B has no children. The bequest is void.
- (c) A lease for years of a house was bequeathed to A for his life, and after his decease to the children of B. At the death of the testator, B had two children living, C and D; and he never had any other child. Afterwards during the lifetime of A, C died leaving E his executor. D has survived A. D and E are jointly entitled to so much of the leasehold term as remains unexpired.

<sup>\*</sup> See the Hindu Wills Act (XXI, of 1870), s. 6 (which is reproduced as foot-note at p. 23, supra).

- (d) A sum of money was bequeathed to A for her life, and after her decease to the children\* of B. At the death of the testator, B had two children living, C and D, and after that event, two children, E and F, were born to B. C and E died in the lifetime of A, C having made a will, E having made no will. A has died, leaving D and F surviving her. The legacy is to be divided into four equal parts one of which is to be paid to the executor of C, one to D, one to the administrator of E, and one to F.
- (e) A bequeaths one-third of his lands to B for his life, and after his decease to the sisters of B. At the death of the testator, B had two sisters living, C and D, and after that event another sister E was born. C died during the life of B; D and E have survived B. One-third of A's lands belongs to D. E, and the representatives of C in squal shares.
- (f) A bequeaths 1,000 rupees to B for life, and after his death equally among the children\* of C. Up to the death of B, C had not had any child. The bequest after the death of B is void.
- (g) A bequeaths r coorapees to "all the children," born or to be born," of B, to be divided among them at the drath of C. At the death of the testator, B has two children living, D and E. After the death of the testator, but in the lifetime of C, two other children, F and G, are born to B. After the death of C, another child is born to B. The legacy belongs to D, E, F, and G, to the exclusion of the after-born child of B.
- (h) A bequeaths a fund to the children of B, to be divided among them when the elder shall attain majority. At the testator's death, B had one child living, samed C. He afterwards had two other children, named D and E. E died, but C and D were living when C attained majority. The fund belongs to C, D, and the representatives of E to the exclusion of any child who may be born to B after C's attaining majority.

# PART XII.+

# OF VOID BEQUESTS.

Bequest to person by particular description who is not in existence at testator's death. 99. Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void.

Exception.—If property is bequeathed to a person described as standing in a particular degree of kindred to a specified indivi-

\* See the Hindu Wills Act (XXI. of 1870), s. 6 (which is reproduced as foot-note at p. 23, supra).

† Of Part XII., ss og to 103 (both inclusive) apply to the wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay.—See the Hindu Wills Act (XXI. of 1870), ss. 2 and 6, as amended by the Probate and Administration. Act (V. fo 1881), s. 154.

dual, but his possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise, and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or, if he be dead, to his representatives.

#### Illustrations.

- (a) A bequeaths 1,000 rupees to the eldest son\* of B. At the death to the testator, B has no son. The bequest is void.
- (b) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son\* of C. At the death of the testator, C had no son. Afterwards, during the life of B, a son is born to C. Upon B's death, the legacy goes to C's son.
- (c) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son\* of C. At the death of the testator, C had no son; afterwards, during the life of B, a son named D is born to C. D dies; then B dies. The legacy goes to the representative of D.
- (d) A bequeaths his estate of Green Acre to B for life, and at his decease to the eldest son\* of C. Up to the death of B, C has had no son. The bequest to C's eldest son is void.
  - (e) A bequeaths 1,000 rupees to the eldest son\* of C, to be paid to him after the death of B. At the death of the testator, C has no son, but a son is afterwards born to him during the life of B, and is alive at B's death. C's son is entitled to the 1,000 rupees.
- Bequest to person not in the time of the testator's death, subject existence at testators death to a prior bequest contained in the will, subject to prior bequest. the later bequest shall be void unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

- (a) Property is bequeathed to A for his life, and after his death to his eldest son\* for life, and after the death of the latter, to his eldest son. At the time of the testator's death A has no son. Here the bequest to A's eldest son is a bequest to a person not in existence at the testator's death. It is not a bequest of the whole interest that remains to the testator. The bequest to A's eldest son for his life is void.
- (b) A fund is bequeathed to A for his life, and after his death to his daughters. A survives the testator. A has daughters, some of whom were

<sup>\*</sup> See the Hindu Wills Act (XXI. of 1870), s. 6 (which is reproduced as foot-note at p. 23, supra).

not in existence at the testator's death. The bequest to A's daughters comprises the whole interest that remains to the testator in the thing bequeathed. The bequest to A's daughters is valid.

- (c) A fund is bequeathed to A for his life, and after his death to his daughters, with a direction that, if any of them marries under the age of eighteen, her portion shall be settled, so that it may belong to herself for life, and may be divisible among her children after her Jeath. A has no daughters living at the time of the testator's death, but has daughters born afterwards who survive him. Here the direction for a settlement has the effect, in the case of each daughter who marries under eighteen, of substituting, for the absolute bequest to her, a bequest to her merely for her life; that is to say, a bequest to a person not in existence at the time of the testator's death of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund is void.
- (d) A bequeaths a sum of money to B for life, and directs that, upon the death of B, the fund shall be settled upon his daughters, so that the portion of each daughter may belong to herself for life and may be divided among her children" after her death. B has no daughter living at the time of the testator's death. In this case the only bequest to the daughters of B is contained in the direction to settle the fund, and this direction amounts to a bequest, to persons not yet born, of a life-interest in the fund, that is to say, of something which is less than the whole interest that remains in the testator in the thing bequeathed. The direction to settle the fund upon the daughters of B is void.
- Rule against perpetuity.

  In the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong

- (a) A fund is bequeathed to A for his life; and after his death to B for his life; and after B's death to such of the sons of B as shall first attain the age of 25. A and B survive the testator. Here the son of B, who shall first attain the age of 25, may be a son born after the death of the testator such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of A and B; and the vesting of the fund may thus be delayed beyond the lifetime of A and B and the minority of the sons of B. The bequest after B's death is void.
- (b) A fund is bequeathed to A for his life; and after his death to B for his life; and after B's death to such of B's sons\* as shall first attain the age of 25. B dies in the lifetime of the testator, leaving one or more sons

<sup>\*</sup> See the Hindu Wills Act (XXI. of 1870), s. 6 (which is reproduced as foot-note at p. 23, supra).

In this case the sons of B are persons living at the time of the testator's decease, and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

- (c) A fund is bequeathed to A for his life, and after his death to B for his life, with a direction that, after B's death, it shall be divided amongst such of B's children\* as shall attain the age of 18: but that, if no child of B shall attain that age the fund shall go to C. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of B, a person living at the testator's decease. All the bequests are valid.
- (d) A fund is bequeathed to trustees for the benefit of the testator's daughters, with a direction that, if any of them marry under age, her share of the fund shall be settled, so as to devolve after her death upon such of her children\* as shall attain the age of 18. Any daughter of the testator to whom the direction applies must be in existence at his decease, and any portion of the fund which may eventually be settled as directed must vest not later than 18 years from the death of the daughter whose share it was. All these provisions are valid.
- Bequest to a class, some of whom may come under rules in sections 100 and 101.

  Bequest to a class, some of whom it is inoperative by reason of the rules contained in the two last preceding sections, or either of them, such bequest shall be wholly void.

#### Illustrations.

- (a) A fund is bequeathed to A for life, and after his death to all his children\* who shall attain the age of 25. A survives the testator, and has some children living at the testator's death. Each child of A's living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest. But A may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of A. The bequest to A's children, therefore, is inoperative as to any child born after the testator's death; and, as it is given to all his children as a class, it is not good as to any division of that class, but is wholly void.
- (b) A fund is bequeathed to A for his life, and after his death to B, C, D, and all other the children\* of A who shall attain the age of 25. B, C, D, are children of A living at the testator's decease. In all other respects the case is the same as that suppsed in illustration (a). The mention of B, C, and D by name does not prevent the bequest from being regarded as a bequest to a class, and the bequest is wholly void.

† 8 B. L. R. 400.

<sup>\*</sup> See the Hindu Wills Act (XXI. of 1870), s. 6 (which is reproduced as foot-note at p. 23, supra).

103. Where a bequest is void by reason of any of the rules

Bequest to take effect on contained in the three last preceding failure of bequest void unsections, any bequest contained in the same will, and intended to take effect after or upon failure of such prior bequest, is also void.

## Illustratins.

- (3) A fund is bequeathed to A for his life and after his death to such of his sons as shall first attain the age of 25, for his life, and after the decease of such son, to B. A and B survive the testator. The bequest to B is intended to take effect after the bequest to such of the sons of A as shall first attain the age of 25, which bequest is void under section 101. The bequest to B is void.
- (b) A fund is bequeathed to A for his life, and after his death to such of his sons\* as shall first attain the age of 25, and, if no son of A shall attain that age, to B. A and B survive the testator. The bequest to B is intended to take effect upon failure of the bequest to such of A's sons\* as shall first attain the age of 25, which bequest is void under section 101. The bequest to B is void.
- Effect of direction for accumulate the income arising from any property shall be void; and the property shall be disposed of as if no accumulation had been directed.

Exception.—Where the property is immoveable, or where accumulation is directed to be made from the death of the testator, the direction shall be valid in respect only of the income arising from the property within one year next following the testator's death;

and at the end of the year such property and income shall be disposed of respectively as if the p-ried during which the accumulation has been directed to be made had elapsed.

- (a) The will directs that the sum of 10,000 rupees shall be invested in Government securities, and the income accumulated for 20 years, and that the principal together with the accumulations, shall then be divided between A, B, and C. A, B, and C are entitled to receive the sum of 10,000 rupees at the end of the year from the testator's death.
- (b) The will directs that 10,000 rupees shall be invested, and the income accumulated until A shall marry, and shall then be paid to him. A is entitled to receive 10,000 rupees at the end of a year form the testator's death.

<sup>\*</sup> See the Hindu Wills Act (XXI, of 1870), s. 6 (which is reproduced as foot-note at p. 23, supra).

- (c) The will directs that the rents of the farm of Sultanpur shall be accumulated for ten years, and that the accumulation shall be then paid to the eldest son of A. At the death of the testator, A has an eldest son living, named B. B shall receive, at the end of one year from the testator's death, the rents which have accrued during the year, together with any interest which may have been made by investing them.
- (d) The will directs that the rents of the farm of Sultanpur shall be accumulated for ten years, and that the accumulations shall then be paid to the eldest son of A. At the death of the testator, A has no son. The bequest is void.
- (e) A bequeaths a sum of money to B, to be paid to him when he shall attain the age of 18, and directs the interest to be accumulated till he shall arrive at that age. At A's death, the legacy becomes vested in B; and so much of the interest as is not required for his maintenance and education is accumulated not by reason of the direction contained in the will, but in consequence of B's minority.
- Bequest to religious or shall have power to bequeath any property charitable uses.

  to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons.

## Illustration.

 $\Lambda$ , having a nephew, makes a bequest by a will not executed nor deposited as required—

for the relief of poor people;
for the maintenance of sick soldiers;
for the erection or support of a hospital;
for the education and preferment of orphans;
for the support of scholars;
for the erection or support of a school;
for the building and repairs of a bridge
for the making of roads;
for the erection or support of a church;
for the repairs of a church;
for the benefit of ministers of religion;
for the formation or support of a public garden;
All these bequests are void.

# PART XIII.\*

# OF THE VESTING OF LEGACIES.

Date of vesting of legacy when payment or possession pestponed.

Date of vesting of legacy entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary

intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time, and without having received the legacy.

And in such cases the legacy is, from the testator's death, said to be vested in interest.

Explanation.—An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that if a particular event shall happen, the legacy shall go over to another person.

- (a) A bequeaths to B 100 rupees to be paid to him at the death of C. On A's death the legacy becomes vested in interest in B, and if he dies before C, his representatives are entitled to the legacy.
- (b) A bequeaths to B 100 rupees to be paid to him upon his attaining the age of 18. On A's death the legacy becomes vested in interest in B.
- (c) A fund is bequeathed to A for life, and after his death to B. On the testator's death, the legacy to B becomes vested in interest in B.
- (d) A fund is bequeathed to A until B attains the age of 18, and then to B. The legacy to B is vested in interest from the testator's death.
- (e) A bequeaths the whole of his property to B upon trust to pay certain debts out of the income, and then to make over the fund to C. At A's death the gift to C becomes vested in interest in him:
- (f) A fund is bequeathed to A, B, and C in equal shares to be paid to them on their attaining the age of 18 respectively, with a proviso that, if all of them die under the age of 18, the legacy shall devolve upon D. On the death of the testator, the shares vest in interest in A, B, and C, subject to be divested in case A, B, and C shall all die under 18, and, upon the

<sup>\*</sup> Part XIII. applies to the wills of Hindus, Jainas, Buddhists, and Sikhs, in the Lower Provinces of Bengal, and in the towns of Madras and Bombay.—See the Hindu Wills Act (XXI. of 1870), s. 2

death of any of them (except the last survivor) under the age of 18, his vested interest passes, so subject, to his representatives.

Date of vesting when legacy contingent upon a specified uncertain event shall happen does not vest until that event happens.

A legacy bequeathed in case a specified uncertain event shall not happen does not vest until the happening of that event becomes impossible.

In either case, until the condition has been fulfilled, the interest of the legatee is called contingent.

Exception.—Where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary, to be applied for his benefit, the bequest of the fund is not contingent.

- (a) A legacy is bequeathed to D in case A, B, and C shall all die under the age of 18. D has a contingent interest in the legacy until A, B and C all die under 18, or one of them attains that age.
- (b) A sum of money is bequeathed to A "in case he shall attain the age of 18," or when he shall attain the age of 18," A's interest in the legacy is contingent until the condition shall be fulfilled by his attaining that age.
- (c) An estate is bequeathed to A for life, and after his death to B, if B shall then be living, but, if B shall not be then living, to C. A, B, and C survive the testator. B and C each take a contingent interest in the estate until the event which is to vest it in one or in the other shall have happened.
- the lifetime of A and C. Upon the death of B, C acquires a vested right to obtain possession of the estate upon A's death.
- (e) A legacy is bequeathed to A when she shall attain the age of 18 or shall marry under that age with the consent of B, with a proviso that, if she shall not attain 18, or marry under that age without B's consent, the legacy shall go to C. A and C each take a contingent interest in the legacy. A attains the age of 18. A becomes absolutely entitled to the legacy, although she may have married under 18 without the consent of B.
- (f) An estate is bequeathed to A until he shall marry, and after that event to B. B's interest in the bequest is contingent until the condition shall be fulfilled by A's marrying.
- (g) An estate is bequeathed to A until he shall take advantage of the Act for the Relief of Insolvent Debtors, and after that event to B. B's interest in the bequest is contingent until A takes advantage of the Act.

- (A) An estate is bequeathed to A if he shall pay 500 rupees to B. A's interest in the bequest is contingent until he has paid 500 rupees to B.
- (i) A leaves his farm of Sultanpur Khurd to B if B shall convey his own farm of Sultanpur Buzurg to C. B's interest in the bequest is contingent until he has conveyed the latter farm to C.
- (j) A fund is bequeathed to A if B shall not marry C within five years after the testator's death. A's interest in the legacy is contingent until the condition shall be fulfilled by the expiration of the five years without B's having married C, or by the occurrence, within that period, of an event which makes the fulfilment of the condition impossible.
- (&) A fund is bequeathed to A if B shall not make any provision for him by will. The legacy is contingent until B's death.
- (1) A bequeaths to B 500 rupees a year upon his attaining the age of 18, and directs that the interest, or a competent part thereof, shall be applied for his benefit until he reaches that age. The legecy is vested.
- (m) A bequeaths to B 500 rupees when he shall attain the age of 18, and directs that a certain sum, out of another fund, shall be applied for his maintenance until he arrives at that age. The legacy is contingent.
- Vesting of interest in bequest to such members of a age, a person who has not attained class as shall have attained that age cannot have a vested interest in the legacy.

## Illustration.

A fund is bequeathed to such of the children of A as shall attain the age of 18, with a direction that, while any child of A shall be under the age of 18, the income of the share to which it may be presumed he will be eventually entitled, shall be applied for his maintenance and education. No child of A, who is under the age of 18, has a vested interest in the bequest.

# PART XIV.\*

# OF ONEROUS BEQUESTS.

109. Where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully.

Part XIV papplies to the wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the tows of Madras and Bombay.—See the Hindu Wills Act. (XXI. of 1870), s. 2.

#### Illustration.

A, having shares in (X), a prosp erous joint-stock company, and also shares in (Y), a joint-stock company in difficulties, in respect or which shares hereby calls are expected to be made, bequeaths to B all his shares in joint-stock companies. B refuses to accept the shares in (Y). He forfeits the shares in (X).

One of two separate and independent bequests to same person may be accepted, and the other refused.

110. Where a will contains two separate and independent bequests to the same person, the legatee is at liberty to accept one of them, and refuse the other, although the former may be beneficial and the latter onerous.

#### Illustration.

A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is higher than the house can be I eft for, bequeather to B the lease and a sum of money. B refuses to accept the lease. He shall not, by his refusal, forfeit the money.

## PART XV.\*

# OF CONTINGENT BEQUESTS.

111. Where a legacy is given if a specified uncertain event

Bequest contingent upon specified uncertain event, no time being mentioned for its occurrence.

shall happen, and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect unless such event happens before the period

when the fund bequeathed is payable or distributable.

- (a) A legacy is bequeathed to A, and, in case of his death, to B. If A survives the testator, the legacy to B does not take effect. .
- (b) A legecy is bequeathed to A, and, in case of his death without children, to B. If A survives the testator, or dies in his lifetime leaving a child, the legacy to B does not take effect.
- (c) A legacy is bequeathed to A when and if he attains the age of 18. and, in case of his death, to B. A attains the age of 18. The legacy to B does not take effect.

Part XV. applies to the wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay .- See the Hindu Wills Act (XXI. of 1870), s. 2.

- (d) A legacy is bequeathed to A for life, and after his death to B, and, "in case of B's death without children," to C. The words "in case of B's death without children" are to be understood as meaning "in case B shall die without children during the lifetime of A."
- (e) A legacy is bequeathed to A for life, and after his death to B and, "in case of B's death," to C. The words "in case of B's death" are to be considered as meaning "in case B shall die in the lifetime of A."
- 112. Where a bequest is made to such of certain persons as

  Bequest to such of certain shall be surviving at some period, but
  persons as shall be surviving at some period, but
  the exact period is not specified, the
  legacy shall go to such of them as shall
  be alive at the time of payment or distribution unless a contrary intention appear by the will.

## Illustrations.

- (a) Property is bequeathed to A and B, to be equally divided between them, or to the survivor of them. If both A and B survive the testator, the legacy is equally divided between them. If A dies before the testator, and B survives the testator, it goes to B.
- (b) Property is bequeathed to A for life, and after his death to B and C, to be equally divided between them, or to the survivor of them. B dies during the life of A, C survives A. At A's death the legacy goes to C.
- (c) Property is bequeathed to A for life, and after his death to B and C, or the survivor, with a direction that if B should not survive the testator, his children are to stand in his place. C dies during the life of the testator. B survives the testator, but dies in the lifetime of A. The legacy goes to the representative of B.
- (d) Property is bequeathed to A for life, and after his death to B and C<sub>r</sub> with a direction that, in case either of them dies in the lifetime of A, the whole shall go to the survivor. B dies in the lifetime of A. Afterwards C dies in the lifetime of A. The legacy goes to the representative of C.

# PART XVI.\*

# OF CONDITIONAL BEQUESTS.

Bequest upon impossible 118. A bequest upon an imposcondition. sible condition is void.

<sup>\*</sup> Part XVI. applies to the wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay—See the Hindu Wills Act (XXI. of 1870), s. 2.

#### Illustrations.

- (a) An estate is bequeathed to A on condition that he shall walk one hundred miles in an hour. The bequest is void.
- (b) A bequeaths 500 rupees to B on condition that he shall marry A's daughter. A's daughter was dead at the date of the will. The bequest is word.
- 114. A bequest upon a condition, the fulfilment of which

  Bequest upon illegal or would be contrary to law or to morality,
  immoral condition.

## Illustrations.

- (a) A bequeaths 500 rupers to B on condition that he shall murder C. The bequest is void.
- (b) A bequeaths 5,000 rupees to his niece if she will desert her husband. The bequest is void.
- 115. Where a will imposes a condition to be fulfilled before
  Fulfilment of condition the legatee can take a vested interest in
  precedent to vesting of lethe thing bequeathed, the condition shall
  be considered to have been fulfilled if it
  has been substantially complied with.

- (a) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C, D, and E. A marries with the written consent of B. C is present at the marriage. D sends a present to A previous to the marriage. E has been personally informed by A of his intentions, and has made no objection. A has fulfilled the condition.
- (b) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C, and D. D dies. A marries with the consent of B and C. A has fulfilled the condition.
- (c) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C, and D. A marries in the lifetime of B, C, and D, with the consent of B and C only. A has not fulfilled the condition.
- (d) A legacy is bequested to A on condition that he shall marry with the consent of B, C, and D. A obtains the unconditional assent of B, C, and D, to his marriage with E. Afterwards B, C, and D capriciously retract their consent. A marries E, A has fulfilled the condition.
- (e) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C, and D. A marries without the consent of B, C, and D, but obtains their consent after the marriage. A has not fulfilled the condition.

- (f) A makes his will, whereby he bequeaths a sum of money to B if B shall marry with the consent of A's executors. B marries during the lifetime of A, and A afterwards expresses his approbation of the marriage. A dies. The bequest to B takes effect.
  - (g) A legacy is bequeathed to A if he executes a certain document within a time specified in the will. The document is executed by A within a reasonable time, but not within the time specified in the will. A has not performed the condition, and is not entitled to receive the legacy.
  - Bequest to A, and, on of the same thing to another, if the prior failure of prior bequest to B. bequest shall fail, the second bequest shall take effect upon the failure of the prior bequest although the failure may not have occurred in the manner contemplated by the testator

- (a) A bequeaths a sum of money to his own children surviving him, and, if they all die under 18, to B. A dies without having ever had a child. The bequest to B takes effect.
- (d) A bequeaths a sum of maney to B on condition that he shall execute a certain document within three months after A's death, and, if he should neglect to do so, to C. B dies in the testator's lifetime. The bequest to C takes effect.
- 117. Where the will shows an intention that the second be-When second bequest not quest shall take effect only in the event to take effect on failure of of the first bequest failing in a particular first. manner, the second bequest shall not take effect unless the prior bequest fails in that particular manner.

#### Illustration.

A makes a bequest to his wife but, in case she should die in his lifetime, bequeaths to B that which he had bequeathed to her. A and his wife perish together under circumstances which make it impossible to prove that she died before him. The bequest to B does not take effect.

Bequest over, conditional upon happening of specified uncertain event.

Bequest over, conditional uncertain event shall happen, the thing bequeathed shall go to another person; or that, in case a specified uncertain event shall not happen, the thing bequeathed shall go over to another person.

In each case the ulterior bequest is subject to the rules contained in sections 107, 108, 109, 110, 111, 112, 113, 114, 116, and 117.

- (a) A sum of money is bequeathed to A, to be paid to him at the age of 18, and, if he shall die before he attains that age, to B. A takes a vested interest in the legacy, subject to be divested and to go to B in case A shall die under 18.
- (b) An estate is bequeathed to A, with a proviso that, if A shall dispute the competency of the testator to make a will, the estate shall go to B. A disputes the competency of the testator to make a will. The estate goes to B.
- (c) A sum of money is bequeathed to A for life, and after his death to B, but, if B shall then be dead, leaving a son, such son is to stand in the place of B. B takes a vested interest in the legacy, subject to be divested if he dies leaving a son in A's lifetime.
- (d) A sum of money is bequeathed to A and B, and if either should die during the life of C, then to the survivor living at the death of C. A and B die before C. The gift over cannot take effect, but the representative of A takes one-half of the money, and the representative of B
- (e) A bequeathed to B the interest of a fund for life, and directs the fund to be divided at her death equally among her three children, or such of them as shall be leaving at her death. All the children, of B die in B's lifetime. The bequest over cannot take effect, but the interests of the children pass to their representatives.
- 119. An ulterior bequest of the kind contemplated by the Condition must be strict. last preceding section cannot take effect unless the condition is strictly fulfilled.

## Illustrations.

- (a) A legacy is bequeathed to A with a proviso that, if he marries without the consent of B, C, and D, the legacy shall go to E. D dies. Even if A marries without the consent of B and C, the gift to E does not take effect.
- (b) A legacy is bequeathed to A with a proviso that, if he marries without the consent of B, the legacy shall go to C. A marries with the consent of B. He afterward becomes a widower, and marries again without the consent of B. The bequest to C does not take effect.
- (c) A legacy is bequeathed to A, to be paid at 18 or marriage, with a proviso that, if A dies under 18 or marries without the consent of B, the legacy shall go to C. A marries under 18 without the consent of B. The bequest to C takes effect.

Original bequest not affected by invalidity of second, valid, the original bequest is not affected by it.

- (a) An estate is bequeathed to A for his life, with a condition superadded that, if he shall not, on a given day, walk too miles in an hour, the estate shall go to B. The condition being void, A retains his estate as if no condition had been inserted in the will.
- (b) An estate is bequeathed to A for her life, and, if she do not desert her husband, to B. A is entitled to the estate during her life as if no condition had been inserted in the will.
- (c) An estate is bequeathed to A for life, and, if he marries, to the eldest son of B for life. B, at the date of the testator's death, had not had a son. The bequest over is void under section 92, and A is entitled to the estate during his life.

Bequest conditioned that it shall cease to have effect in case specified uncertain event shall happen or a not happen. 121. A bequest may be made with the condition superadded that it shall cease to have effect in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

#### Illustrations.

- (a) An estate is bequeathed to A for his life, with a proviso that, in case he shall cut down a certain wood, the bequest shall cease to have any effect. A cuts down the wood; he loses his life-interest in the estate.
- (b) An estate is bequeathed to A provided that, if he marries under the age of 25 without the consent of the executors named is the will, the estate shall cease to belong to him. A marries under 25 without the consent of the executors. The estate ceases to belong to him.
- (c) An estate is bequeathed to A provided that, if he shall not go to England within three years after the testator's death, his interest in the estate shall cease. A does not go to England within the time prescribed. His interest in the estate ceases.
- (d) An estate is bequeathed to A, with a proviso that, if she becomes a nun, she shall cease to have any interest in the estate. A becomes a nun. She loses her interest under the will.
- (e) A fund is bequeathed to A for life, and after his death to B, if B shall be then living, with a proviso that, if B shall become a nun, the bequest to her shall cease to have any effect. B becomes a nun in the lifetime of A. She thereby loses her contingent interest in the fund.
- 122. In order that a condition that a bequest shall cease to Such condition must not have effect may be valid, it is necessary be invalid under section 107: that the event to which it relates be one which could legally constitute the condition of a bequest as contemplated by the 107th section.

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# 123. Where a bequest is made with a condition superadded

Result of legatee rendering impossible or indefinitely postponing act for which no time specified, and on non-performance of which subject-matter to go over.

that, unless the legatee shall perform a certain act, the subject-matter of the bequest shall go to another person, or the bequest shall cease to have effect, but no time is specified for the performance of the act, if the legatee takes any step

which renders impossible or indenfinitely postpones the performance of the act required, the legacy shall go as if the legatee had died without performing such act. 500 33 347-11-4

### Illustrations.

- (a) A bequest is made to A with a proviso that, unless he enters the army, the legacy shall go over to B. A takes holy orders, and thereby renders, it impossible that he should fulfil the condition. B is entitled to receive the legacy.
- (b) A bequest is made to A, with a proviso that it shall cease to have any effect if he does not marry B's daughter. A marries a stranger, and thereby indefinitely postpones the fulfilment of the condition. The bequest ceases to have effect.
- 124. Where the will requires an act to be performed by the Performance of condition. legatee within a specifed time, either as precedent or subsequent, a condition to be fulfilled before the legacy is enjoyed, or as a condition upon the non-fulfilment of which the subject-matter of the bequest is to go over to another person, or the bequest is to cease to have effect, the act must be performed within the time specified unless the performance of it be prevented by fraud, in which case such further Further time in case of time shall be allowed as shall be requisite

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#### PART XVII.\*

OF BEQUESTS WITH DIRECTIONS AS TO APPLICATION OR ENJOYMENT.

Direction that funds be employed in particular manner following absolute bequest of same to or for benefit of any person.

125. Where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction.

#### Illustration.

A sum of money is bequeathed towards purchasing a country residence for A, or to purchase an annuity for A, or to purchase a commission in the army for A, or to place A in any business. A chooses to receive the legacy in money. He is entitled to do so.

126. Where a testator absolutely bequeaths a fund, so as to sever it from his own estate, but directs Direction that mode of that the mode of enjoyment of it by the enjoyment of absolute belegatee shall be restricted so as to secure quest is to be restricted, to secure specified benefit for a specified benefit for the legatee, if that legatee. benefit cannot be obtained for the lega-

tee, the fund belongs to him as if the will had contained no such direction.

#### Illustrations.

- (a) A bequeaths the residue of his property to be divided equally among his daughters, and directs that the shares of the daughters shall be settled upon themselves respectively for life, and be paid to their children after their death. All the daughters die unmarried. The representatives of each daughter are entitled to her share of the residue.
- (b) A directs his trustees to raise a sum of money, for his daughter, and he then directs that they shall invest the fund, and pay the income arising from it to her during her life, and divide the principal among her children after her death. The daughter dies without having ever had a child. Her representatives are entitled to the fund.
- 127. Where a testator does not absolutely bequeath a fund, so as to sever it from his own estate, but Bequest of fund for cergives it for certain purposes, and part of tain purposes, some of which cannot be fulfilled. those purposes cannot be fulfilled, the

<sup>\*</sup> Part XVII. applies to the wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay .- See the Hindu Wills Act (XXI. of 1870), s. 2.

fund, or so much of it as has not been exhausted upon the objects contemplated by the will, remains a part of the estate of the testator.

## Illustrations.

- (a) A directs that his trustees shall invest a sum of money in a particular way, and shall pay the interest to his son for life, and, at his death, shall divide the principal among his children; the son dies without having ever had a child. The fund, after the son's death, belongs to the estate of the testator.
- (b) A bequeaths the residue of his estate to be divided equally among his daughters, with a direction that they are to have the interest only dur-ing their lives, and that, at their decease, the fund shall go to their children. The daughters have no children. The fund belongs to the estate of the testator. traugen de la late <u>et de la company de</u> O**n** la company de la compa

# PART XVIII.\*

## OF BEQUESTS TO AN EXECUTOR.

Legatee named as executor cannot take unless he shows intention to act as executor.

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128. If a legacy is bequeathed to a person who is named an executor of the will, he shall not take the legacy unless he proves the will, or otherwise manifests an interest to act as executor.

## Illustration.

A legacy is given to A, who is named an executor. A orders the funeral according to the directions contained in the will, and dies a few days after the testator, without having proved the will: A has manifested an intention to act as executor.

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Part XVIII. applies to the wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay.—See the Hindu Wills Act (XXI. of 1870), s. 2. San Agent State of the State of

## PART XIX.\*

#### OF SPECIFIC LEGACIES.

129. Where a testator bequeaths to any person a specified part of his property which is distinguished from all other parts of his property, the legacy is said to be specific.

### Illustrations.

### (a) A bequeaths to B—

"the diamond-ring presented to him by C:"

"his gold chain:"

"a certain bale of wool;"

" a certain piece of cloth:"

"all his household-goods, which shall be in or about his dwelling house in M Street in Calcutta at the time of his death:";

"the sum of 1,000 rupees in a certain chest:"

"the debt which B owes him:"
"all his bills, bonds, and securities belonging to him ying a
his lodgings in Calcutta:"

"all his furniture in his house in Calcutta:" ( )

- "all his goods on board a certain ship then lying in the river Hugli:"
- "2,000 rupees which he has in the hands of C:"

"the money due to him on the bond of D:"
"his mortgage on the Rampur Factory:"

"one-half of the money owing to him on his mortgage of Rampur Factory!"

" 1 000 rupees being part of a debt due to him from C:"

"his capital stock of 1,000% in East India Stock :"

- "his promissory notes of the Government of India for 10,000" rupees in their four per cent. loan:"
- "all such sums of money as his executors may, after his death receive in respect of the debt due to him from the insolvent firm of D and Company?"

"all the wine which he may have in his cellar at the time of his death?"

"such of his horses as B may select :"

"all his shares in the Bank of Bengal:"

"all the shares in the Bank of Bengal which he may possess at the time of his death:"

"all the money which he has in the 53 per cent, loan of the Government of India:"

"all the Government securities he shall be entitled to at the time of his decease;"

<sup>\*</sup> Part XIX, applies to the wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay.—See the Hindu Wills Act (XXI. of 1870), s. 2.

Each of these legacies is specific.

(b) A, having Government promissory notes for 10,000 rupees, bequeaths to his executors "Government promissory notes for 10,000 rupees in trust to sell " for the benefit of B :

The legacy is specific.

(c) A, having property at Benares, and also in other places, bequeaths to B all his property at Benares:

The legacy is specific.

(d) A bequeaths to B-

his house in Calcutta:

his zemindari of Rampur;

his talug of Ramnagar ;

his lease of the indigo-factory of Salkya;

an annuity of 500 rupees out of the rents of his zemindari of W:

A directs his zemindary of X. to be sold, and the proceeds to be invested for the benefit of B

Each of these bequests is specific.

(e) A, by his will, charges his zemindari of Y with an annuity of 1,000 rupees to C during his life, and subject to this charge he bequeaths the zemindari to D:

Each of these bequests is specific.

(f) A bequeaths a sum of money—

to buy a house in Calcutta for B:

to buy an estate in zilla Faridpur for B:

to buy a diamond-ring for B;

to buy a horse for B;

to be invested in shares in the Bank of Bengal for B;

to be invested in Government securities for B;

A bequeaths to B-

"a diamond ring;"

" a horse :"

"to,000 rupees worth of Government securities ;"

"an annuity of 500 rupees;"

" 2,000 rupees to be paid in cash;"

"so much money as will produce 5,000 rupees four per cent Government securities :"

These bequests are not specific.

(g) A, having property in England and property in India, bequeaths a legacy to B, and directs that it shall be paid out of the property which he may leave in India. He also bequeaths a legacy to C, and directs that it shall be paid out of the property which he may leave in England:

No one of these legacies is specific.

130. Where a sum certain is bequeathed, the legacy is not specific merely because the stocks, funds, Bequest of sum certain where stocks, &c., in which or securities in which it is invested are

invested are described. described in the will

## A bequeaths to B-

" 10,000 rupees of his funded property;"

"10,000 rupees of his property now invested in shares of the East Indian Railway Company;"

"10,000 rupees, at present secured by mortgage of Rampur

No one of these legacies is specific.

131. Where a bequest is made, in general terms, of a certain Bequest of stock where amount of any kind of stock, the legacy testator had, at date of will is not specific merely because the testaequal or greater amount of stock of same kind. stor was at the date of his will, possessed of stock of the specified kind, to an equal or greater amount than the amount bequeathed.

#### Illustration.

A bequeaths to B 5,000 rupees five per cent. Government securities, A had, at the date of the will, five per cent. Government securities for

The legacy is not specific.

132. A money-legacy is not specified merely because the will directs its payment to be postponed un-Bequest of money where not payable until part of testil some part of the property of the testatator's property disposed of tor shall have been reduced to a certain in certain way. form, or remitted to a certain place.

## Illustration.

A bequeaths to B 10,000 rupees, and directs that this legacy shall be paid as soon A's property in India shall be realized in England: The legacy is not specific.

133. Where a will contains a bequest of the residue of the When enumerated articles testator's property along with an enumernot deemed specifically beation of some items of property not prequeathed. viously bequeathed, the articles enumerated shall not be deemed to be specifically bequeathed.

134. Where property is specifically bequeathed to two or more Retention, in form of persons in succession, it shall be retained specific bequest to several in the form in which the testator left it, persons in succession. although it may be of such a nature that its value is continually decreasing.

- (a) A, having a lease of a house for a term of years, 15 of which were unexpired at the time of his death, has bequeathed the lease to B for his life, and, after B's death, to C. B is to enjoy the property as A left it, although, if B lives for 15 years, C can take nothing under the bequest.
- (b) A, having an annuity during the life of B, bequeaths it to C for his life, and, after C's death, to D. C is to enjoy the annuity as A left it although, if B dies before D, D can take nothing under the bequest.
- Sale and investment of persons in succession is not specifically proceeds of property bequeathed to two or more persons in succession.

  Sale and investment of persons in succession is not specifically bequeathed, it shall, in the absence of any direction to the contrary, be sold, and the proceeds of the sale shall be invested in such securities as the High Court may, by any general rule to be made from time to time, authorize or direct, and the fund thus constituted shall be enjoyed by the successive legatees

#### Illustration.

A having a lease for a term of years, bequeaths, "all his property" to B for life, and after B's death to C. The lease must be sold and the proceeds invested as stated in the text, and the annual income arising from the fund is to be paid to B for life. At B's death the capital of the fund is to be paid to C.

Where deficiency of assets to pay legacies, specific legacy not to abate with general legacies.

according to the terms of the will.

136. If there be a deficiency of assets to pay legacies, a specific legacy is not liable to abate with the general legacies.

## PART XX.\*

## OF DEMONSTRATIVE LEGACIES.

187. Where a testator bequeaths a certain sum of money or Demonstrative legacy de. a certain quantity of any other commofined.

dity, and refers to a particular fund or stock so as to constitute the same the primary fund or stock out of which payment is to be made, the legacy is said to be demonstrative.

<sup>\*</sup> Part XX. applies to the wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay.—See the Hindu Wills Act (XXI. of 1870), s. 2.

Explanation.—The distinction between a specific legacy and a demonstrative legacy consists in this that,

where specified property is given to the legatee, the legacy is specific:

where the legacy is directed to be paid out of a specified property, it is demonstrative.

#### Illustrations

(a) A bequeaths to B 1,000 rupees, being part of a debt due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. The legacy to B is specific; the legacy to C is demonstrative.

(b) A bequeaths to B-

"ten bushels of the corn which shall grow in his filed of

"So chests of the indigo which shall be made at his factory of Rampur;"

"10,000 rupees out of his five per cent. promissory notes of the Government of India;"

an annuity of 500 rupees "from his funded property;"

"1.000 rupecs out of the sum of 2,000 rupees due to him by

A bequeaths to B an annuity, and directs it to be paid out of the rents arising from his taluq of Ramnagar :

A bequeaths to B-

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"10,000 rupees out of his estate at Ramnagar, or charges it on his estate at Ramnagar;"

"10,000 rupees, being his share of the capital embarked in a certain business:"

Each of these bequests is demonstrative.

188. Where a portion of a fund is specifically bequeathed, Order of payment when

legacy directed to be paid out of fund the subject of specific legacy.

and a legacy is directed to be paid out of the same fund, the portion specifically bequeathed shall first be paid to the legatee, and the demonstrative legacy shall be paid out of the residue of the fund, and, so far as the residue shall be deficient, out of the general assets of the testator.

## Illustration.

estanti pel A bequeaths to B 1,000 rupees, being part of a debt due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. The debt due to A from W is only 1,500 rupees; of these 1,500 rupees, 1,000 rupees belong to B, and 500 rupees are to be paid to C. C is also to receive 500 rupees out of the general assets of the testator.

#### PART XXL\*

### OF ADEMPTION OF LEGACIES.

Ademption explained.

Ademption explained.

not belong to the testator at the time of his death, or has been converted into property of a different kind, the legacy is adeemed; that is, it cannot take effect by reason of the subject-matter having been withdrawn from the operation of the will.

#### Illustrations.

(a) A bequeaths to B-

"the diamond-ring presented to him by C;"

"his gold-chain;"

"a certain bale of wool;"
"a certain piece of cloth;"

"all his household-goods which shall be in or about his dwelling house in M Street in Calcutta at the time of his death."

A, in his lifetime.-

sells or gives away the ring; converts the chain into a cup; converts the wool into cloth; makes the cloth into a garment;

takes another house into which he removes all his goods:

Each of these legacies is adeemed.

(b) A bequeaths to B-

"the sum of 1,000 rupees in a certain chest;".

"all the horses in his stable:"

At the death of A, no money is found in the chest, and no horses in the stable. The legacies are adeemed.

(c) A bequeaths to B certain bales of goods. A takes the goods with him on a voyage. The ship and goods are lost at sea, and A is drowned. The legacy is adeemed.

140. A demonstrative legacy is not a deemed by reason that

Non-ademption of demonthe property on which it is charged by
the will does not exist at the time of the
death of the testator, or has been converted into property of a
different kind: but it shall, in such case, be paid out of the general
assets of the testator.

Part XXI applies to the wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay.—See the Hindu Wills Act (XX. of 1870), s. 2.

Ademption of specific bequest of right to receive something of value from a third party, and the testator himself receives it, the bequest is adeemed.

#### Illustrations.

(a) A bequeaths to B-

"the debt which C owes him;"

"2,000 rupees which he has in the hands of D;"

"the money due to him on the Bond of E;"

"his mortgage on the Rampur Factory :"

All these debts are extinguished in A's lifetime, some with and some without his consent. All the legacies are adeemed.

(b) A bequeaths to B "his interest in certain policies of life [assurance." A in his lifetime receives the amount of the policies. The legacy is adeemed.

Ademption pro tanto by testator's receipt of part of entire thing specifically bequeathed.

142. The receipt by the testator of a part of an entire thing specifically bequeathed shall operate as an ademption of the legacy to the extent of the sum so received.

#### Illustration.

A bequeaths to B "the debt due to him by C." The debt amounts to 10,000 rupees. C pays to A 5,000 rupees, the one-half of the debt. The legacy is revoked by ademption so far as regards the 5,000 rupees received by A.

143. If a portion of an entire fund or stock be specifically

Ademption pro tanto by testator's receipt of portion of entire fund of which portion has been specifically bequeathed. bequeathed, the receipt by the testator of a portion of the fund or stock shall operate as an ademption only to the extent of the amount so received; and the residue of the fund or stock shall be of the specific lessor.

applicable to the discharge of the specific legacy.

#### Illustration.

A bequeaths to B one-half of the sum of 10,000 rupees due to him from W. A, in his lifetime, receives 6,000 rupees, part of the 10,000 rupees. The 4,000 rupees which are due from W to A at the time of his death belong to B under the specific bequest.

Order of payment where

portion of fund specifically bequeathed to one legatee, and legacy charged on same fund to another, and testator having received portion of that fund remainder insufficent to pay both legacies.

of the general assets of the testator.

144. Where a portion of a fund is specifically bequeathed to one legatee, and a legacy charged on the same fund is bequeathed to another legatee, if the testator receives a portion of that fund and the remainder of the fund is insufficient to pay both the specific and the demonstrative legacy, the specific legacy shall be paid first, and the residue (if any) of the fund shall be applied, so far as it will extend, in payment of the demonstrative legacy, and the rest of the demonstrative legacy shall be paid out

#### Illustration.

A bequeaths to B 1,000 rupees, part of the debt of 2 000 rupees due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt, due to him from W. A afterwards receives 500 rupees part of the debt, and dies leaving only 1,500 rupees due to him from W. Of these 1,500 rupees, 1,000 rupees belong to B, and 500 rupees are to be paid to C. C is also to receive 500 rupees out of the general assets of the testator.

Ademption where stock specifically bequethed does not exist at testator's death.

145. Where stock, which has been specifically bequeathed, does not exist at the testator's death, the legacy is adeemed.

### Illustration.

## A bequeaths to B-

"his capital stock of 1,000l. in East India Stock;"

"his promissory notes of the Government of India for 10,000 rupees in their four per cent. loan :"

A sells the stock and the notes. The legacies are adeemed.

Ademption pro where stock, specifically bequeathed, exists in part only at testator's death.

146. Where stock, which has been specifically bequeathed. does only in part exist at the testator's death, the legacy is adeemed so far as regards that part of the stock which has ceased to exist.

## Illustration.

A bequeaths to B. "his 10,000 rupees in the 5½ per cent. loan of the Government of India." A sells one-half of his 10,000 rupees in the loan in question. One-half of the legacy is adeemed.

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Stock specifically bequeathed sold but replaced, and belonging to testator at his death.

153. Where stock specifically bequeathed is sold, and an equal quantity of the same stock is afterwards purchased, and belongs to the testator at his death, the legacy is not adeemed.

## PART XXII.\*

OF THE PAYMENT OF LIABILITIES IN RESPECT OF THE SUBJECT OF A BEQUEST.

154. Where property specifically bequeathed is subject, at the Non-liability of executor death of the testator, to any pledge, lien, or incumbrance created by the testator to exonerate specific legatees. himself, or by any person under whom he claims, then, unless a contrary intention appears by the will, the legatee, if he accepts the bequest, shall accept it subject to such pledge or incumbrance, and shall (as between himself and the testator's estate) be liable to make good the amount of such pledge or incumbrance.

A contrary intention shall not be interred from any direction which the will may contain or the payment of the testator's debts generally.

Explanation.-A periodical payment in the nature of land-revenue or in the nature of rent is not such an incumbrance as is contemplated by this section.

#### Illustrations.

- (a) A bequeaths to B the diamond-ring given him by C. At A's death the ring is held in pawn by D, to whom it has been pledged by A. It is the duty of A's executors, if the state of the testator's assets will allow them, to allow B to redeem the ring.
- (b) A bequeaths to B a zemindari which at A's death, is subject to a mortgage for 10,000 rupees, and the whole of the principal sum together with interest to the amount of 1,000 rupees is due, at A's death. B if he, accepts the bequest, accepts it subject to this charge, and is liable, as between himself and A's estate, to pay the sum of 11,000 rupees thus due.

title to things bequeathed to be at cost of his estate.

Completion of testator's 155. Where anything is to be done to complete the testator's title to the thing bequeathed, it is to be done at the cost of the testator's estate.

<sup>\*</sup> Part XXII. applies to the wills of Hindus, Jainas, Sikhas, and Bud dhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay, - See the Hindu Wills Act (XXI, of 1870), s. 2.

- (a) A, having contracted in general terms for the purchase of a piece of land at a certain price, bequeaths it to B, and dies before he has paid the purchase-money. The purchase-money must be made good out of A's assets.
- (b) A having contracted for the purchase of a piece of land for a certain sum of money one half of which is to be paid down and the other half secured by mortgage of the land bequeaths it to B, and dies before he has paid or secured any part of the purch se-money. One-half of the purchase-money must be paid out of A's assets.
- Exoneration of legatee's property, in respect of which payment immoveable property for which land-revenue or rent payable periodically.

  be: ween such estate and the legatee) make good such payments or a proportion of them up to the day of his death.

#### Illustration.

A bequeaths to B a house, in respect of which 365 rupees are payable annually by way of rent. A pays his rent at the usual time, and dies 25 days after. A's estate shall make good 25 rupees in respect of the rent.

Exoneration of specific tesis a specific bequest of stock in a joint-gatee's stock in joint-stock stock company, if any call or other payment is due from the testator at the time of his death in respect of such stock, such call or payment shall, as between the testator's estate and the legatee, be borne by such estate; but, if any call or other payment shall, after the testator's death, become due in respect of such stock, the same shall, as between the testator's estate and the legatee, be borne by the legatee if he accept the bequest.

#### Illustrations.

- (a) A bequeathed to B his shares in a certain railway. At A's death there was due from him the sum of 5l. in respect of each share, being the amount of a call which had been duly made, and the sum of 5s. in respect of each share, being the amount of interest which had accrued due in respect of the call. These payments must be borne by A's estate.
- (b) A has agreed to take 50 shares in an intended joint-stock company, and has contracted to pay up 5l in respect of each share, which sum must be paid before his title to the shares can be completed. A bequeaths these shares to B. The estate of A must make good the payments which were necessary to complete A's title.
- (c) A bequeaths to B his shares in a certain railway. B accepts the legacy. After A's death, a call is made in respect of the shares. B must pay the call.

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(d) A bequeaths to B his shares in a joint-stock company. B accepts the bequest. Afterwards the affairs of the company are wound up, and each shareholder is called upon for contribution. The amount of the contribution must be borne by the legatee.

idition A is the owner of ten shares in a railway company. At a meeting held during his lifetime a call is made of 3l. per share payable by three instalments. A bequeaths his shares to B and dies between the day fixed for the payment of the first and the day fixed for the payment of the second instalment, and without having paid the first instalment. A's estate must pay the first instalment, and B, if he accept the legacy, must pay the remaining instalments.

#### PART XXIII.\*

OF BEQUESTS OF THINGS DESCRIBED IN GENERAL TERMS.

153. If there be a bequest of something described in general

Bequest of thing described terms, the executor must purchase for the legatee what may reasonably be considered to answer the description.

#### Illustrations.

- (a) A bequeaths to B a pair of carriage-horses, or a diamond-ring. The executor must provide the legatee with such articles if the state of the assets will allow it.
- (b) A bequeaths to B." his pair of carriage-horses." A had no carriage-horses at the time of his death. The legacy fails.

## PART XXIV.\*

OF BEQUEST OF THE INTEREST OF PRODUCE OF A FUND.

159. Where the interest or produce of a fund is bequeathed

Bequest of interest or to any person, and the will affords no
produce of fund indication of an intention that the enjoyment of the bequest should be of limited duration, the principal as
well as the interest shall belong to the legatee.

#### Illustrations.

(a) A bequeaths to B the interest of his five per cent, promissory notes of the Government of India. There is no other clause in the will affecting

<sup>\*</sup> Parts XXIII, and XXIV. apply to the wills of Hindus, Jainas, Sikhs and Buddhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay.—See the Hindu Wills Act (XXI. of 1870), s. 2.

those securities. B is entitled to A's five per cent, promissory notes of the Government of India.

- (b) A bequeaths the interest of his 5½ per cent. promissory notes of the Government of India to B for his life, and after his death to C. B is entitled to the interest of the notes during his life; and C is entitled to the notes upon B's death.
- (c) A bequeaths to B the rents of his lands at X. B is entitled to the lands.

#### PART XXV.\*

#### OF BEQUESTS OF ANNUITIES.

Annuity created by will to receive it for his life only unless a payable for life only unless contrary intention appears by the will.

And this rule shall not be varied by the circumstance that the annuity is directed to be paid out of the property generally, or that a sum of money is

to be paid out of the property generally, or that a sum of money is bequeathed to be invested in the purchase of it.

#### Illustrations.

- (a) A bequeaths to B 500 rupees a year. B is entitled, during his life, to receive the annual sum of 500 rupees.
- (b) A bequeaths to B the sum of 500 rupees monthly. B is entitled during his life to receive the sum of 500 rupees every month.
- (c) A bequeaths an annuity of 500 rupees to B for life, and, on B's death, to C. B is entitled to an annuity of 500 rupees during his life. C, if he survives B, is entitled to an annuity of 500 rupees from B's death until his own death.

161. Where the will directs that an annuity shall be provided

Period of vesting where will directs that annuity be provided out of proceeds of property, or out of property generally, or where money bequeathed to be invested in purchase of annuity. for any person out of the proceeds of property or out of property generally, or where money is bequeathed to be invested in the purchase of any annuity for any person on the testator's death, the legacy vests in interest in the legatee, and he is entitled, at his option, to

have an annuity purchased for him, or to receive the money appropriated for that purpose by the will.

<sup>\*</sup> Part XXV. applies to the wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay,—See the Hindu Wills Act (XXI. of 1870), s. 2.

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#### Illustrations.

- (a) A by his will directs that his executors shall, out of his property, purchase an annuity of 1,000 rupees for B. B is entitled, at his option, to have an annuity of 1,000 rupees for his life purchased for him, or to receive such a sum as will be sufficient for the purchase of such an annuity.
- (b) A bequeaths a fund to B for his life, and directs that, after B's death, it shall be laid out in the purchase of an annuity for C. B and C survive the testator. C dies in B's lifetime. On B's death the fund belongs to the representative of C.
- Abatement of annuity.

  Begacies given by the will, the annuity legacies given by the will.
- Where gift of annuity and a residuary gift, the whole of the annuity is to be residuary gift, whole annuity satisfied before any part of the residue is paid to the residuary legatee and, if necessary, the capital of the testator's estate shall be applied for that purpose.

## PART XXVI.\*

## Of Legacies to Creditors and Portioners.

- Creditor prima facie entiled to legacy as well as legacy is meant as a satisfaction of the debt.

  Creditor prima facie entilegacy is meant as a satisfaction of the debt, the creditor shall be entitled to the legacy as well as to the amount of the debt.
- 165. Where a parent, who is under obligation by contract to Child prima facis entitled provide a portion for a child, fails to do to legacy as well as portion. so, and afterwards bequeaths a legacy to the child, and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy as well as the portion.

<sup>\*</sup> Part XXVI. applies to the wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay,—See the Hindu Wills Act (XXI. of 1870), s. 2.

A, by articles entered into in contemplation of his marriage with B, covenanted that he would pay to each of the daughters of the intended marriage a portion of 20,000 rupees on her marriage. This covenant having been broken, A bequeaths 20,000 rupees to each of the married daughters of himself and B. The legatees are entitled to the benefit of this bequest in addition to their portions.

166. No bequest shall be wholly or partially adeemed by a No ademption by subsequent provision made by settlement quent provision for legatee.

### Illustrations.

- (a) A bequeaths 20,000 rupees to his son B. He afterwards gives to B the sum of 20,000 rupees. The legacy is not thereby adeemed.
- (b) A bequeaths 40,000 rupees to B his orphan niece whom he had brought up from her infancy Afterwards, on the occasion of B's marriage, A settles upon her the sum of 30,000 rupees. The legacy is not thereby diminished.

### PART XXVII.\*

## OF ELECTION.

- Circumstances in which thing which he has no right to dispose election takes place. of the person to whom the thing belongs shall elect either to confirm such disposition, or to dissent from it; and, in the latter case, he shall give up any benefits which may have been provided for him by the will.
- 163. The interest so relinquished shall devolve as if it had Devolution of interest renot been disposed of by the will in linquished by owner. favour of the legatee, subject nevertheless, to the charge of making good to the disappointed legatee the amount or value of the gift attempted to be given to him by the will.
- 169. This rule will apply whether the testator does or does

  Testator's belief as to his not believe that which he professes to dispose of by his will to be his own.

<sup>\*</sup> Part XXVII. applies to the wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay.—See the Hindu Wills Act (XXI. of 1870), s. 2.

- (a) The farm of Sultanpur was the property of C. A bequeathed it to B, giving a legacy of 1,000 rupees to C. C has elected to retain his farm of Sultanpur, which is worth 800 rupees. C forfeits his legacy of 1,000 rupees, of which 800 rupees goes to B, and the remaining 200 rupees falls into the residuary bequest, or devolves according to the rules of intestate succession, as the case may be.
- (b) A bequeaths an estate to B in case B's elder brother (who is married and has children) shall leave no issue living at his death. A also bequeaths to C a jewel which belongs to B. B must elect to give up the jewel, or to lose the estate.
- (c) A bequeaths to B 1,000 rupees, and to C an estate which will, under a settlement, belong to B if his elder brother (who is married and has children) shall leave no issue living at his death. B must elect to give up the estate, or to lose the legacy.
- (d) A, a person of the age of 18, domiciled in British India, but swning real property in England, to which C is heir at law, bequeaths a legacy to C, and, subject thereto devises and bequeaths to B "all his property whatsoever and wheresoever," and dies under 21. The real property in England does not pass by the will. C may claim his legacy without giving up the real property in England.

Bequest for man's benefit how regarded for purpose of election.

170. A bequest for a man's benefit is, for the purpose of election, the same thing as a bequest made to himself.

#### Illustration.

The farm of Sultanpur Khurd being the property of B, A bequeathed it to C; and bequeathed another farm, called Sultanpur Buzurg to his own executors, with a direction that it should be sold, and the proceeds applied in payment of B's debts. B must elect whether he will abide by the will or keep his farm of Sultanpur Khurd in opposition to it.

171. A person taking no benefit directly under the will, but Person deriving benefit in. deriving a benefit under it indirectly, is directly not put to election.

## Illustration.

The lands of Sultanpur are settled upon C for life, and, after his death, upon D, his only chi'd. A bequeaths the lands of Sultanpur to B, and 1 000 rupees to C. C dies intestate shortly after the testator, and without having made any election. D takes out administration to C, and as administrator elects on behalf of C's estate to take under the will. In that capacity he receives the legacy of 1,000 rupees, and accounts to B, for the rents of the lands of Sultanpur which accrued after the death of the testator and before the death of C. In his individual character he retains the lands of Sultanpur in opposition to the will.

Person taking in individual capacity under will may, in other character, elect to take in opposition. 172. A person who, in his individual capacity, takes a benefit under the will, may, in another character, elect to take in opposition to the will.

#### Illustration.

The estate of Sultanpur is settled upon A for life, and after his death upon B. A leaves the estate of Sultanpur to D, and 2,000 rupees to B, and 1,000 rupees to C, who is B's only child. B dies intestate shortly after the testator, without having made an election. C takes out administration to B, and as administrator elects to keep the estate of Sultanpur in opposition to the will, and to relinquish the legacy of 2,000 rupees. C may do this, and yet claim his legacy of 1 000 rupees under the will.

Exception to the six last rules.—Where a particular gift is expressed in the will to be in lieu of something belonging to the legatee, which is also in terms disposed of by the will, if the legatee claims that thing, he must relinquish the particular gift, but he is not bound to relinquish any other benefit given to him by the will.

#### Illustration.

Under A's marriage-settlement his wife is entitled, if she survives him, to the enjoyment of the estate of Sultanpur during her life. A, by his will, bequeaths to his wife an annuity of 200/during her life, in lieu of her interest in the estate of Sultanpur, which estate he bequeaths to his son. He also gives his wife a legacy of 1,000/. The widow elects to take what she is entitled to under the settlement. She is bound to relinquish the annuity, but not the legacy of 1,000/.

When acceptance of benefit given by the will constitutes an election by the legatee to take under the election to take under will. elect, and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances.

## Illustrations.

- (a) A is owner of an estate called Sultanpur Khurd, and has a life-interest in another estate called Sultanpur Buzu g, to which, upon his death, his son B will be absolutely emitted. The will of A gives the estate of Sultanpur Khurd to B, and the estate of Sultanpur Buzurg to C. B, is ignorance of his own right to the estate of Sultanpur Buzurg allows C to take possession of it, and enters into possession of the estate of Sultanpur Khurd. B has not confirmed the bequest of Sultanpur Buzurg to C.
- (b) B, the eldest son of A, is the possessor of an estate called Sultanpur A bequeaths Sultanpur to C, and to B the residue of A's property. B

having been informed by A's executors that the residue will amount to 5,000 rupees, allows C to take possession of Sultanpur. He afterwards discovers that the residue does not amount to more than 500 rupees. B has not confirmed the bequest of the estate of Sultanpur to C.

174. Such knowledge or waiver of inquiry shall, in the ab-Presumption arising from sence of evidence to the contrary, be enjoyment by legatee for two presumed if the legatee has enjoyed for years. two years the benefits provided for him by the will without doing any act to express dissent.

175. Such knowledge or waiver of inquiry may be inferred Confirmation of bequest by from any act of the legatee which renact of legatee. ders it impossible to place the persons interested in the subject-matter of the bequest in the same condition as if such act had not been done.

## Illustration.

A bequeaths to B an estate to which C is entitled, and to C a coalmine. C takes possession of the mine, and exhausts it. He has thereby confirmed the bequest of the estate to B.

176. If the legatee shall not, within one year after the death When testator's repre- of the testator, signify to the testator's sentatives may call upon representatives his intention to confirm legatee to elect. or to dissent from the will, the representatives shall, upon the expiration of that period, require him to make his election:

and, if he does not comply with such requisition within a reasonable time after he has received it, he Effect of non-compliance. shall be deemed to have elected to confirm the will.

177. In case of disability, the election shall be postponed Postponement of election until the disability, ceases, or until the in case of disability. election shall be made by some compe-A SHEET STATE tent authority. Paragraph of the first 

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## PART XXVIII.\*

## OF GIFTS IN CONTEMPLATION OF DEATH.

Property transferable by of death.

178. A man may dispose, by gift gift made in contemplation made in contemplation of death, of any moveable property which he could dispose of by will.

A gift is said to be made in contemplation of death where a When gift said to be made man, who is ill, and expects to die shortin contemplation of death. ly of his illness, delivers to another the possession of any moveable property to keep as a gift in case the donor shall die of that illness.

Such gift resumable.

Such a gift may be resumed by the giver.

It does not take effect if he recovers from the illness during which it was made; nor if he survives the When it fails. person to whom it was made.

#### Illustrations.

(a) A, being ill, and in expectation of death, delivers to B to be retained by him in case of A's death-

a watch :

a bond granted by C to A;

a bank-note;

a promissor y note of the Government of India endorsed in blank :

a bill of exchange endorsed in blank; certain mortgage-deeds:

A dies of the illness during which he delivered these articles.

B is entitled to-

the watch:

the debt secured by C's bond;

the bank note :

the promissory note of the Government of India;

the bill of exchange;

the money secured by the mortgage deeds.

(b) A, being ill, and in expectation of death, delivers to B the key of a trunk, or the key of a warehouse in which goods of bulk belonging to A are deposited with the intention of giving him the control over the contents of the trunk, or over the deposited goods, and desires him to keep them in case

<sup>\*</sup> This Part does not apply to Hindus .- See Hindu Wills Act (XXI. of 1870).

of A's death. A dies of the illness during which he delivered these articles. B is entitled to the trunk and its contents, or to A's goods of bulk in the warehouse.

(c) A, being ill, and in expectation of death, puts aside certain articles in separate parcels and marks upon the parcels respectively the names of B and C The parcels are not delivered during the life of A. A dies of the illness during which he set aside the parcels. B and C are not entitled to the contents of the parcels.

## PART XXIX.\*

OF GRANT OF PROBATE AND LETTERS OF ADMINISTRATION.

Character and property of executor or administrator as such.

179. The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property+ of the deceased person vests in him as such.

180. When a will Administration with copy annexed of authenticated copy of will proved abroad.

has heen proved and deposited in a Court of competent jurisdiction, situated beyond the limits of the province, whether in the British dominions or in a foreign country, and a properly authenticated copy of the will is produced letters of administration may be granted with a copy of such copy an-

Probate only to appointed executor.

nexed.

181. Probate can be granted only to an executor appointed by the will.

Appointment, express or implied.

182. The appointment may be express or by necessary implication.

As to grants of letters of administration and probates to the Adminis-

trator-General, see Act II. of 1874 ss 14-33. Nothing in Act X. of 1865 is to be taken to supersede or affect the rights or duties and privileges of the Administrator General .- See ibid, s. 66.

† This does not include property vested in the deceased as executor or administrator under Act X. of 1865-12 Ben. 428, 429.

1 7 Bom. A. C. J. 64: 7 Ben. 563.

<sup>\*</sup> Of Part XXIX.. s. 187 applies to the wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the towns of Madras and Bombay .- See the Hindu Wills Act (XXI of 1870), s 2, as amended by the Probate and Administration Act (V. of 1881), s. 154.

- (a) A wills that C be his executor if B will not. B is appointed executor by implication.
- (b) A gives a legacy to B and several legacies to other persons, among the rest to his daughter in law, " C, and adds, " but, should the within-named C be not living, I do constitute and appoint B my whole and sole executrix." C is appointed executrix by implication.
- (c) A appoints several persons executors of his will and codicils, and his nephew residuary legatee, and in another codicil are these words: " I appoint my nephew my residuary legatee to discharge all lawful demands against my will and codicils. signed of different dates." The nephew is appointed an executor by implication.
- 183. Probate cannot be granted to any person who is a minor or is of unsound mind, nor to a married Persons to whom probate cannot be granted. woman without the previous consent of her husband.

Grant of probate to several executors simultaneously or at different times.

184. When several executors are appointed, probate may be granted to them all simultaneously, or at different times.

#### Illustration.

A is an executor of B's will by express appointment and C an executor of it by implication. Probate may be granted to A and C at the same time, or to A first and then to C, or to C first and then to A.

Separate probate of codicil discovered after grant of probate.

185. If a codicil be discovered after the grant of probate, a separate probate of that codicil may be granted to the executor if it in no way repeals the appointment of executors made by the will.

If different executors are appointed by the codicil, the probate Procedure when different of the will must be revoked, and a new executors appointed by codiprobate granted of the will and the cil. codicil together.

186. When probate has been granted to several executors, and one of them dies, the entire re-Accrual of representation to surviving executor. presentation of the testator accrues to the surviving executor or executors.

<sup>\*</sup> See s. 6, Act XXI. of 1870 (the Hindu Wills Act).

Right as executor or legatee when established. the will, or with a copy of nexed."İ

137.\* No right as executor or legatee can be estalished in any Court of Justice unless a Court of competent jurisdiction f "in British India" shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration "with an authenticated copy of the will, an-

188. Probate of a will, when granted establishes the will from the death of the testator, and renders Effect of probate. valid all intermediate acts of the executor as such.

189. Letters of administration cannot be granted to any person who is a minor or is of unsound To whom administration mind, nor to a married woman without may not be granted. the privous consent of her husband.

190. No right to any part of the property of a person who Right to intestate's pro- has died intestate can be established in any Court of Justice unless letters of perty when established. administration have first been granted by a Court of competent jurisdiction.

191. Letters of administration entitle the administrator to all rights belonging to the intestate as effec-Effect of letters of admitually as if the administration had been nistration. granted at the moment after his death.

192. Letters of administration do not render valid any in-Acts not validated by ad. termediate acts of the administrator tendministration. ing to the diminution or damage of the intestate's estate.

This section applies to the wills of Hindus, &c, in the Lower Provinces of Bengal and in the towns of Madras and Bombay.-See the Hindu Wills Act (XXI. of 1870).

In s. 187, the words first and next quoted have been substituted for the words "within the province" and "under the 180th section," respectively, by the Repealing and Amending Act (VIII of 1903), s. 2.

i S. 190 does not apply to any part of the property of a Native Christian .- See Act VII. of 1901.

f So far as regards the Administrator General, the High Court at the Presidency-town is a Court of competent jurisdiction within the meaning of ss. 187 and 190, wheresoever within the Presidency the property to be comprised in the probate or letters of administration may be situate. - See Act II. of 1874, s. 14. For prohibition of charges for commission by executors or administrators other than the Administrator-General, see ib., s. 56.

Grant of administration the executorship, letters of administration where executor has not resourced.

The executorship, letters of administration the executorship, letters of administration shall not be granted to any other person until a citation has been issued calling upon the executor to accept or renounce his executorship;

except that, when one or more of several executors have proved a will, the Court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved.

194. The renuciation may be made orally in the presence Form an effect of renun. of the Judge, or by a writing signed by chall preclude him from ever thereafter applying for probate of the will appointing him executor.

195. If the executor renounce, or fail to accept, the executorProcedure where executor ship within the time limited for the acrenounces or fails to accept
within time limited.

be proved, and letters of administration
with a copy of the will annexed may be granted to the person who
would be entitled to administration in case of intestacy.\*

Grant of administration to universal or residuary made a will, but has not appointed an executor; or

when he has appointed an executor who is legally incapable, or refuses to act, or has died before the testator, or before he has proved the will; or

when the executor dies after having proved the will, but before he has administered all the estate of the deceased; †

an universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered.

197. When a residuary legatee who has a beneficial interest Right to administration of survives the testator, but dies before the estate has been fully administered, his representative has the same right to administration with the will annexed as such residuary legatee.

<sup>\*</sup> See s. 6, Act XXI, of 1870. † 12 B. L. R. 423, 427.

Grant of administration where no executor nor residuary legatee, or the declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administrative of such legatee.

the state of the deceased if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly.

199. Letters of administration with the will annexed shall not be granted to any legatee other than an universal or residuary. Citation has been issued and published in the manner hereinafter mentioned calling on the next-of-kin to accept or refuse letters of administration

200. When the deceased has died intestate, those who are Order in which connected with him either by marriage tions entitled to administer. Or by consanguinity are entitled to obtain letters of administration of his estate and effects in the order, and according to the rules, hereinafter stated.

201. If the deceased has left a widow, administration shall

Administration to widow unless Court see cause to exclude her, either on the ground of some personal disqualification, or because she has no interest in the estate of the deceased.

## Illustrations.

(a) The widow is a lunatic, or has committed adultery, or has been barred by her marriage-settlement of all interest in her husband's estate; there is cause for excluding her from the administration.

(b) The widow has married again since the decease of her husband; this is not good cause for her exclusion.

202. If the Judge thing proper, he may associate any person

Association with widow in or persons with the widow in the administration.

or persons with the widow in the administration who would be entitled solely to the administration if there were no widow.

203. If there be no widow, or if the Court see cause to ex-Administration where no clude the widow, it shall commit the adwhdow, or widow excluded. ministration to the person or persons who would be beneficially entitled to the estate according to the rules for the distribution of an intestate's estate:

Provided that, when the mother of the deceased shall be one of the class of persons so entitled, she shall be solely entitled to administration.

- 204. Those who stand in equal degree of kindred to the Title of kindred to administration.

  deceased are equally entitled to administration.\*
- 205. The husband, surviving his wife, has the same right of administration of her estate as the widow has in respect of the estate of her husband.
- 206. When there is no person connected with the deceased by marriage or consanguinity who is entitled to letters of administration, and willing to act, they may be granted to a creditor.
- 207. Where the deceased has left property in British India, Administration where pro-letters of administration must be grantperty left in British India. ed according to the foregoing rules, although he may have been a domiciled inhabitant of a country in which the law relating to testate and intestate succession differs from the law of British India.

## PART XXX.+

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## OF LIMITTED GRANTS.

## (a.) - Grants limited in Duration.

203. When the will has been lost or mislaid since the testaProbate of copy or draft tor's death, or has been destroyed by of lost will.

wrong or accident, and not by any act of the testator, and a copy or the draft of the will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it be produced.

<sup>\*</sup> Ben. Short Notes of Cases, III.

<sup>†</sup> Compare Act V. of 1881, Ch., III. with sub-parts (a) to (f).

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209. When the will has been lost or destroyed, and no copy Probate of contents of has been made, nor the draft preserved, probate may be granted of its contents lost or destroyed will. if they can be established by evidence.

210. When the will is in the possession of a person residing Probate of copy where out of the province in which application for probate is made, who has refused or original exists. neglected to deliver it up, but a copy has been transmitted to the executor, and it is nec-ssary for the interests of the estate that probate should be granted without waiting for the arrival of the original, probate may be granted of the copy so transmitted, limited until the will or an authenticated copy of it be produced.

211. Where no will of the deceased is forthcoming, but there is reason to believe that there is a will Administration until will in existence, letters of administration produced. may be granted, limited until the will or an authenticated copy of it be produced.

(b)—Grants for the Use and Benefit of others having Right.

212. When any executor is absent from the province in which application is made, and there is Administration, with will no executor within the province willing annexed, to attorney of absent executor. to act, letters of administration with the will annexed may be granted to the attorney\* of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself.

213. When any person to whom, if present, letters of administration, with the will annexed, might Administration, with will be granted, is absent from the province,

limited as above mentioned.

annexed, to attorney of absent person, who, if present, would be entitled to administer.

Administration to attorney of absent person entitled to administer in case of in-

testacy.

214. When a person entitled to administration in case of intestacy is absent from the province, and no person equally entitled is willing to act, letters of administration may be granted to the attorney of the absent

letters of administration, with the will

annexed, may be granted to his attorney.\*

person, limited as before mentioned.

<sup>\*</sup> The attorney must be within the jurisdiction of the Court .- 4 B. L. R., Ap., 49.

- 215. When a minor is sole executor or sole residuary legatee,

  Administration during letters of administration, with the will minority of sole executor or annexed, may be granted to the legal guardian of such minor, or to such other person as the Court shall think fit until the minor shall have completed the age of eighteen years, at which period, and not before, probate of the will shall be granted to him.
- Administration during executor who has attained majority, or minority of several executor who has attained majority, or two or more residuary legatees, and no residuary legatee who has attained majority, the grant shall be limited until one of them shall have completed the age of eighteen years.
- Administration for use or a person who would be solely entitled and benefit of lunatic jus to the estate of the intestate according habens. to the rule\* for the distribution of intestates' estates, be a lunatic, letters of administration, with or without the will annexed, as the case may be, shall be granted to the person to whom the care of his estate has been committed by competent authority, or, if there be no such person, to such other person as the Court may think fit to appoint, for the use and benefit of the lunatic until he shall become of sound mind.
- 218. Pending any suit touching the validity of the will of a Administration pendente deceased person, or for obtaining or relite. voking any probate or any grant of letters of administration, the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the Court, and shall act under its direction.

## (c.)—For Special Purposes.

219. If an executor be appointed for any limited purpose Probate limited to purse specified in the will, the probate shall be pose specified in will. limited to that purpose, and, if he should appoint an attorney to take administration on his behalf, the letters of administration, with the will annexed, shall accordingly be limited.

<sup>\*</sup> Sic., read rules,

Administration, with will an attorney to prove a will on his behalf, annexed, limited to particular purpose.

and the authority is limited to a particular purpose, the letters of administration, with the will annexed, shall be limited accordingly.

221. Where a person dies, leaving property of which he was

Administration limited to the sole or surviving trustee, or in which property in which person he had no beneficial interest on his own account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the person beneficially interested in the property, or to some other person on his behalf.

222. When it is necessary that the representative of a person Administration limited to deceased be made a party to a pending suit.

Suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the said cause or suit, and until a final decree shall be made therein, and carried into complete execution.

Administration limited to any probate or letters of administration, purpose of becoming party the executor or administrator to whom to suit to be brought against administrator.

The province within which the Court that has granted the probate or letters of administration is situate, it shall be lawful for such Court to grant, to any person whom it may, think fit, letters of administration, limited to the purpose of becoming and being made a party to a suit to be brought against the executor or administrator, and carrying the decree which may be made therein into effect.

Administration limited to ving the property of a deceased person, collection and preservation of deceased's property. the Court within whose district any of the property is situate may grant to any person whom such Court may think fit, letters of administration limited to the collection and preservation of the property of the

deceased, and giving discharges for debts due to his estate, subject to the directions of the Court.

225. When a person has died intestate, or leaving a will of

Appointment, as administrator, of person other than one who, under ordinary circumstances, would be en-titled to administration.

which there is no executor willing and competent to act, or where the executor shall, at the time of the death of such person, be resident out of the province. and it shall appear to the Court to be

necessary or convenient to appoint some person to administer the estate or any part thereof, other than the person who, under ordinary circumstances, would be entitled to a grant of administra-tion, it shall be lawful for the Judge, in his direction, having regard to consangunity, amount of interest, the safety of the estate and probability that it will be properly administered, to appoint such person as he shall think fit to be administrator.

and in every such case letters of administration may be limited or not as the Judge shall think fit.

## (d.) - Grants with Exception.

Probate or administration with will annexed, subject to exception.

226. Whenever the nature of the case requires that an exception be made, probate of a will or letters of administration with the will annexed shall be granted subject to such exception.

227. Whenever the nature of the case requires that an excep-Administration with ex- tion be made, letters of administration shall be granted subject to such excepception. tion.

## (e.) - Grants of the Rest.

228. Whenever a grant, with exception, of probate or letters of administration, with or without the Probate or administration will annexed, has been made, the person entitled to probate or administration of the remainder of the deceased's estate may take a grant of propate or letters of administration, as the case may be, of the rest of the deceased's estate.

## (f.) - Grants of Effects unadministered.

229. If the executor to whom probate has been granted have died, leaving a part of the testator's Grant of effects unadmiestate unadministered, a new represennistered.

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tative may\* be appointed for the purpose of administering such part of the estate.

230. In granting letters of administration of an estate not Rules as to grants of ef- fully administered, the Court shall be guided by the same rules as apply to fects unadministered. original grants, and shall grant letters of administration to those persons only to whom original grants might have been made.†

Administration when limited grant expired, and still some part of estate unadministered.

231. When a limited grant has expired by effluxion of time. or the happening of the event or contingency on which it was limited, and there is still some part of the deceased's estate unadministered, letters of admi-

nistration shall be granted to those persons to whom original grants might have been made t

## (g.) - Alteration in Grants.

232. Errors in names and descriptions, or in setting forth the What errors may be rec- time and place of the deceased's death, or the purpose in a limited grant, may tified by Court. be rectified by the Court, and the grant of probate or letters of administration may be altered and amended accordingly.

Procedure where codicil discovered after grant of administration with will annexed.

283. If, after the grant of letters of administration with the will annexed, a codicil be discovered, it may be added to the grant on the due proof and identification, and the grant altered and amended accordingly.

## (h.) - Revocation of Grants.

Revocation or annulment for just cause.

234. The grant of probate or letters of administration may be revoked or annuled for just cause.

" Just cause."

Explanation.— Just cause is-

rn, that the proceedings to obtain the grant were defective in substance:

\*[12 B. L. R. 428.

<sup>† 12</sup> B L. R. 428; see Hindu Wills Act (XXI, of 1870), s. 6. t See Hindu Wills Act (XXI. of 1870), s. 6.

Compare the Probate and Administration Act (V. of 1881), Ch. IV.

and, that the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case:

3rd, that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently;

4th, that the grant has become useless and inoperative through circumstances:

\*5th, that the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Part XXXIV. of this Act, or has exhibited under that Part an inventory or account which is untrue in a material respect.

#### Illustrations.

- (a) The Court by which the grant was made had no jurisdiction.
- (b) The grant was made without citing parties who ought to have been cited.
  - (c) The will of which probate was obtained was forged or revoked.
- (d) A obtained letters of administration to the estate of B, as his widow, but it has since transpired that she was never married to him,
- (e) A has taken administration to the estate of B as if he had died intestate, but a will has since been discovered.
  - (f) Since probate was granted, a later will has been discovered.
- (g) Since probate was granted, a codicil has been discovered, which revokes or adds to the appointment of executors under the will.
- (h) The person to whom probate was, or letters of administration were a granted has subsequently become of unsound mind.

# PART XXXI.†

OF THE PRACTICE IN GRANTING AND REVOKING PROBATES AND LETTERS OF ADMINISTRATION.

285. The District Judge shall have jurisdiction in granting Jurisdiction of District and revoking; probates and letters of administration in all cases within his woking probates, &c. district.

<sup>\*</sup> Cl. 5 has been added by Act VI. of 1889, s. 2.

<sup>†</sup> Compare the Probate and Administration Act (V. of 1881), Ch. V.

<sup>‡</sup> See 2 N.-W. P. 268.

Power to appoint Delegate of District Judge to deal with

non-contentious cases.

235A.\* The High Court may, from time to time, appoint such Judicial officers within any district as it thinks fit to act for the District Judge as Delegates to grant probate and letters of administrations in non-contentious cases within

such local limits as it may from time to time prescribe:

Provided that, in the case of High Courts not established by Royal Charter, such appointment be made with the previous sanction of the Local Government.

Persons so appointed shall be called "District Delegates."

District Judge's powers as to grant of probate and administration.

236. The District Judge shall have the like powers and authority in relation to the granting of probate and letters of administration. and all matters connected therewith, as are by law vested in him in relation to any civil suit or proceeding

depending in his Court. 237. The District Judge may order any person to produce District Judge may order person to produce testa-

mentary papers.

and bring into Court any paper or writing, being or purporting to be testamentary, which may be shown to be

in the possession or under the control of such person;

and, if it be not shown that any such paper or writing is in the possession or under the control of such person, but there is reason to believe that he has the knowledge of any such paper or writing. the Court may direct such person to attend for the purpose of being examined respecting the same;

and such person shall be bound to answer such questions as may be put to him by the Court, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like punishment under the Indian Penal Code† in case of default attending, or in not answering such questions, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit, and had made such default :

and the costs of the proceeding shall be in the discretion of the ludge.

† Act XLV. of 1860.

<sup>\*</sup> S. 215A has been inserted by Act VI. of 1881, s. 2.

288. The proceedings of the Court of the District Judge in Proceedings of District relation to the granting of probate and Judge's Court in relation to letters of administration shall, except as probate and administration. hereinafter otherwise provided, be regulated, so far as the circumstances of the case will admit, by the Code of Civil Procedure.\*

289. Until probate be granted of the will of a deceased when and how District person or an administrator of his estate Judge to interfere for probe constituted, the District Judge, within tection of property.

whose jurisdiction any part of the property of the deceased person is situate, is authorized and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he shall see fit, to appoint an officer to take and keep possession of the property.

240. Probate of the will or letters of administration to the When probate or adecsate of a deceased person may be ministration may be grant-granted by the District Judge under the ed by District Judge. seal of the Court if it shall appear by a petition, verified as hereinafter, mentioned of the person applying for the same, that the testator or intestate, as the case may be, at the time of his decease, had a fixed place of abode, or any property, moveable or immoveable, within the jurisdiction of the Judge.

241. When the application is made to the Judge of a Disposal of application trict in which the dec ased had no made to Judge of District fixed abode at the time of his death, it in which deceased had no shall be in the discretion of the Judge fixed abode.

to refuse the application if, in his judgment, it could be disposed of more justly or conveniently in another district, or, where the application is for letters of administration, to grant them absolutely or limited to the property within his own jurisdiction.

<sup>\*</sup> This reference to Act VIII. of 1859 should now be read as applying to Act V. of 1908—See s. 158 of the latter Act.

<sup>†</sup> As to the duty of the District Judge to take charge of property in certain cases, and report to the Administrator-General, and his power to pay certain expenses out of the property, see Act 11., 1874.

S 239 does not apply to any part of the property of a Native Christian,—See Act VII. of 1901.

241A.\* Probate and letters of administration may, upon approbate and letters of administration may be granted by plication for that purpose to any Disministration may be granted by him in by Delegate.

any case in which there is no contention if it appears by petition (verified as hereinafter mentioned) that the testator or intestate, as the case may be, at the time of his death, resided within the jurisdiction of such Delegate.

242. Probate or letters of administration shall have effect

Conclusiveness of probate or letters of administration.

over all the property and estate, moveable or immoveable, of the deceased,
throughout the province in which the
same is "or are"† granted,

and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted:

‡ Provided that probates and letters of administration granted

Effect of unlimited probates, &c., granted by April 1875 shall, unless otherwise
High Court. directed by the grant, have like effect
throughout the whole of British India:

"Provided that probates and letters of administration gran-

(a) by a High Court, or

(b) by a District Judge, where the deceased at the time of his death had his fixed place of abode situate within the jurisdiction of such Judge, and such Judge certifies that the value of the property and estate affected beyond the limits of the Province does not exceed ten thousand rupees.

shall, unless otherwise directed by the grant, have like effect throughout the whole of British India."

<sup>\*</sup> S 241A has been inserted by Act VI. of 1881, s. 3.

<sup>†</sup> The words quoted have been inserted by Act XII. of 1891, s. 2 (2) and Sch.

This provise has been added by Act XIII. of 1875, s. 2.

f For definition of "High Court," see Act II. of 1877.

I The proviso last quoted has been added by Act VIII. of 1903, s. 2 (2.)

242A.\* (1) Where probate or letters of administration has or

Transmission to High have been granted by a High Court or

Courts of certificate of District Judge with the effect referred to in the proviso to section 242, the High Court or District Judge shall send a certificate thereof to the following Courts, namely:—

- (a) when the grant has been made by a High Court, to each of the other High Courts,
- (b) when the grant has been made by a District Judge, to the High Court to which such District Judge is subordinate, and to each of the other High Courts.
- (2) Every certificate referred to in sub-section (1) shall be to the following effect, namely:—
- I, A. B., Registrar [or as the case may be] of the High Court of [or as the case may be], hereby certify **Tudicature** at day of , the High Court of that on the [or as the case may be], granted probate **Tudicature** at of the will for letters of administration of the estate of c.D., late , deceased, to L. F. of and G. H. of , and that such probate [or letters] has [or have] of effect over all the property of the deceased throughout the whole of British Indian:

and such certificate shall be filed by the High Court receiving the same.

- (3) Where any portion of the assets has been stated by the petitioner, as hereinafter provided in sections 244 and 246, to be situate within the jurisdiction of a District Judge in another Province, the Court required to send the certificate referred to in sub-section (1) shall send a copy thereof to such District Judge, and such copy shall be filed by the District Judge receiving the same.
- 243. The application for probate or letters of administration, Conclusiveness of application for probate or administration if properly made and verified in the manner here-inafter mentioned, shall be conclusive for the purpose of authorizing the grant of probate or administration;

and no such grant shall be impeached by reason that the testator or intestate had no fixed place of abode, or no property

<sup>\*</sup> S. 242A has been inserted by Act VIII. of 1903.

within the district at the time of his death, unless by a proceeding to revoke the grant if obtained by a fraud upon the Court.

244. Application for probate shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the will annexed, and stating—

the time of the testator's death, that the writing annexed is his last will and testament, that it was duly excuted,

\* [the amount of assets which are likely to come to the petitioner's hands, and

that the petitioner is the executor named in the will;]

and in addition to these particulars, when the application is to the District Judge, the petition shall further state that the deceased, at the time of his death, had his fixed place of abode, or had some property, moveable or immoveable, situate within the jurisdiction of the Judge;

\*| f[and, when the application is to a District Delegate, the petition shall further state that the deceased, at the time of his death, resided within the jurisdiction of such Delegate.]

the application is to the District Judge, and any portion of the assets likely to come to the petitioner's hands is situate in another Province, the petition shall further state the amount of such assets in each Province and the District Judges within whose jurisdiction such assets are situate.

245. In cases wherein the will is written in any language other for what cases translation than English, or than that in ordinary of will to be annexed to peuse in proceedings before the Court, there shall be a translation thereof annexed to the petition by a translator of the Court if the language be one for which a translator is appointed; or, if the will be in any

Verification of translation by person other than Court translator. other language, then by any person competent to translate the same, in which case such translation shall be verified by

that person in the following manner:-

<sup>\*</sup> As amended by Act VI. of 1880. s. 3. † This paragraph has been added by Act VI. of 1881, s. 4.

<sup>†</sup> In s. 244, this paragraph has been added by Act VIII. of 1903, s. z.

"I (A. B.) do declare that I read and perfectly understand the language and character of the original, and that the above is a true and accurate translation thereof."

243. Applications for letters of administration shall be Petition for letters of made by petition distinctly written as administration.

aforesaid, and stating\*—

the time and place of the deceased's death,

the family or other relatives of the deceased, and their respective residences,

the right in which the petitioner claims,

that the deceased left some property within the jurisdiction of the District Judge "or District Delegate"† to whom the application is made, and

the amount of assets which are likely to come to the petitioner's hands;

‡ and, when the application is to a District Delegate, the petition shall further state that the deceased, at the time of his death, resided within the jurisdiction of such Delegate.

§ Where the application is to the District Judge, and any portion of the assets likely to come to the petitioner's hands is situate in another Province, the petition shall further state the amount of such a sets in each Province, and the District Judges within whose jurisdiction such assets are situate.

246A! (1) Every person applying to any of the Courts mendiction, etc., for probate or letters of administration in certain cases.

his petition in addition to the matters respectively required by section 244 and section 246 of this Act, that, to the best of his belief, no application has been made to any other Court for a probate of the same will or for letters of administration of the same

estate, intended to have such effect as last aforesaid.

<sup>\*</sup> As to the particulars to be stated where the Administrator-General applies for letters of administration, see Act II. of 1874, s. 16.

<sup>†</sup> The words quoted have been inserted by Act VI. of 1881, s. 9. † This paragraph has been added by Act VI. of 1881, s. 4.

This paragraph has been inserted by Act VIII. of 1903, s. 2 (4).

I S. 246A has been inserted by Act VIII. of 1903, s. 2 (5).

or, where any such application has been made, the Court to which it was made, the person or persons by whom it was made, and the proceedings (if any) had thereon.

(2) The Court to which any such application is made under the proviso to section 242 may, if it thinks fit, reject the same.

247. The petition for probate or letters of administration Petition for probate or shall, in all cases, be subscribed by the administration to be signed and verified.

petitioner and his pleader (if any), and shall be verified by the petitioner in the following manner, or to the like effect:—

"I (4. B.,) the petitioner in the above petition, declare that what is stated therein is true to the best of my information and belief."

243. Where the application is for probate, the petition shall Verification of petition for also be verified by at least one of the probate by one witness to witnesses to the will (when procurable) in the manner or to the effect following:—

- "I (C. D.), one of the witnesses to the last will and testament of the testator mentioned in the above petition, declare that I was present, and saw the said testator affix his signature (or mark) thereto (as the case may be) (or that the said testator acknowledged the writing annexed to the above petition to be his last will and testament in my presence)."
- 249. If any petition or declaration which is hereby required

  Punishment for false aver- to be verified shall contain any averment in petition or declara- ment which the person making the
  tion. verification knows or believes to be false,
  such person shall be subject to punishment according to the provisions of the law\* for the time being in force for the punishment
  of giving or fabricating false evidence.
- 250. In all cases it shall be lawful for the District Judge

  District Judge may ex"or District Delegate," if he shall
  amine petitioner in person, think proper.—

to examine the petitioner in person upon oath or solemn

affirmation, and also

to require further evidence of the due execution of the will, or the right of the petitioner to the letters of administration, as the case may be, and

<sup>&</sup>quot; See the Indian Penal Code (Act XLV. of 1860) Ch. XI.

<sup>†</sup> The words quoted have been inserted by Act VI. of 1881, s. 9.

and issue citations to inany interest in the estate of the deceased
spect proceedings.

to come and see the proceedings before
the grant of probate or letters of administration.

The citation shall be fixed up in some conspicuous part of the Court-house, and also in the office of the Collector of the District, and otherwise published or made known in such manner as the Judge of or District Delegate "\* issuing the same may direct.

† Where any portion of the assets has been stated by the petitioner to be situate within the jurisdiction of a District Judge in another Province, the District Judge issuing the same shall cause a copy of the citation to be sent to such other District Judge, who shall publish the same in the same manner as if it were a citation issued by himself, and shall certify such publication to the District Judge who issued the citation.

251. Caveats against the grant of probate or administration Caveats against grant of may be lodged with the District Judge probate or administration.

Or a District Delegate; and, immediately on any caveat being lodged with any District Delegate, he shall send a copy thereof to the District Judge; and, immediately on a caveat being entered with the District Judge, a copy thereof shall be given to the District Delegate, if any, within whose jurisdiction it is alleged the deceased resided at the time of his death, and to any other Judge or District Delegate to whom it may appear to the District Judge expedient to transmit the same.

Form of caveat.

252. The caveat shall be to the following effect:—

"Let nothing be done in the matter of the estate of A. B., late of , deceased, who died on the day of at , without notice to C. D., of "

<sup>\*</sup> The words quoted have been inserted by Act VI. of 1381, s. 9. † This paragraph has been inserted by Act VIII. of 1903, s. 2 (6).

<sup>‡</sup> S. 251 has been substituted for the one originally enacted by Act VI. of 1881, s. 5.

253. No proceeding shall be taken on a petition for probate or letters of administration after a caveat After entry of caveat, no

proceeding taken on peti-tion until after notice to caveator.

again the grant thereof has been entered with the Judge "or officer" to whom the application has been made, "or

notice has been given of its entry with some other Delegate "\* until after such notice to the person by whom the same has been entered, as the Court shall think reasonable.

District Delegate when not to grant probate or administration.

253A. A District Delegate shall not grant probate or letters of administration in any case in which there is contention as to the grant, or in which it otherwise appears to him that

probate or letters of administration ought not to be granted in his Court.

Explanation.—By "contention" is understood the appearance of any one in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding.

Power to transmit statement to District Judge in doubtful cases where no contention.

253B.† In every case in which there is no contention, but it appears to the District Delegate doubtful whether the probate or letters of administration should or should not be granted, or when any question arises in

relation to the grant, or application for the grant, of any probate or letters of administration, the District Delegate may, if he thinks proper, transmit a statement of the matter in question to the District Judge, who may direct the District Delegate to proceed in the matter of the application, according to such instructions as to the Judge may seem necessary, or may forbid any further proceeding by the District Delegate in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Judge.

253C.† In every case in which there is contention, or the District Delegate is of opinion that the probate or letters of administration should be refused in his Court, the petition, with any documents that may have been file therewith shall be re-

Procedure where there is contention, or District Delegate thinks probate or letters of administration should be refused in his Court.

turned to the person by whom the application was made in order

<sup>\*</sup> In s. 253, the words quoted in both places have been inserted by Act VI. of 1881, s. 6.

<sup>†</sup> Ss. 253A, 253B, and 253C have been inserted by Act VI. of 1881, s. 7.

that the same may be presented to the District Judge, unless the District Delegate thinks it necessary, for the purposes of Justice, to impound the same, which he is hereby authorized to do, and in that case the same shall be sent by him to the District Judge.

254. When it shall appear to the Judge "or District Dele-Grant of probate to be gate"\* that probate of a will should be under seal of Court. granted, he will grant the same under the seal of his Court in manner following:—

, Judge of the District of , for Delegate appointed for granting probate or letters Form of such grant. of administration in (here insert the limits of the Delegate's jurisdiction)] + hereby make known that, on the day of in the year , the last will of , a copy whereof is hereunto annexed, was , late of proved and registered before me, and that administration of the property and credits of the said deceased and in any way concerning his will, was granted to , the executor in the said will named she having undertaken to administer the same, and to make a full and true inventory of the said property and credits, and exhibit the same in this Court within six months from the date of this grant, or within such further time as the Court may from time to time appoint, and also to render to this Court a true account of the said property and credits within one year from the same date, or within such further time as the Court may from time to time appoint."]1

255. And, wherever it shall appear to the District Judge "or Grant of letters of admi. District Delegate"\* that letters of administration to be under seal nistration to the estate of a person deceased, with or without a copy of the will annexed, should be granted, he will grant the same under the seal of his Court in manner following:—

"I, , Judge of the District of [or Delegate appointed for granting probate or letters of administration in (here insert the limits of the delegate's jurisdiction)],† hereby make known that on the day of , letters of administration (with or with-

<sup>\*</sup> The words quoted in the first paragraphs of ss. 254 and 255 have been inserted by Act VI. of 1881, s.g.

<sup>†</sup> In ss 254 and 255 these words in brackets (with the brackets themselves) have been inserted by Ac. VI. of 1881, s. 8.

<sup>†</sup> These words in brackets from "he having" to the end of the section have been substituted by Act VI. of 1889, s. 4.

out the will annexed, as the case may be) of the property and credits of , late of , deceased, were granted to

, the father (or as the case may be) of the deceased [he having undertaken to administer the same, and to make a full and true inventory of the said property and credits, and exhibit the same in this Court within six months from the date of this grant, or within such further time as the Court may from time to time appoint, and also to render to this Court a true account of the said property and credits within one year from the same date, or within such further time as the Court may from time to time appoint.]"\*

256. "Every person to whom any grant of letters of administration-bond.

Administration-bond.

a bond to the Judge of the District Court to enure for the benefit of the Judge for the time being with one or more surety or sureties engaging for the due collection, getting in, and administering the estate of the deceased, which bond shall be in such form as the Judge shall, from time to time, by any general or special order direct.

Assignment of adminis- on being satisfied that the engagement tration-bond. of any such bond has not been kept, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise as the Court may think fit, assign the same to some person, his executors, or administrators, who shall thereupon be entitled to sue on the said bond in his own name as if the same had been originally given to him instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustee for all persons interested, the full amount recoverable in respect of any breach thereof.

258. No probate of a will shall be granted until after the Time for grant of probate and administration. letters of administration shall be granted until after the expiration of fourteen clear days, from the day of the testator or intestate's death.

<sup>\*</sup> These words in brackets from "he having" to the end of the section have been substituted by Act VI. of 1889, s. 4.

<sup>†</sup> In s. 256, the words quoted, excepting the Italicized ones added by s. 9 of Act V. of 1902, have been substituted by Act VI. of 1889, s. 6.

Filing of original wills of which probate or administration, with will annexed. granted.

259. Every District Judge "or District Delegate" shall file and preserve all original wills of which probate or letters of administration with the will annexed may be granted by him among the records of his Court until

some public registry for wills is established; and the Local Government shall make regulations for the preservation and inspection of the wills so filed as aforesaid.

- 260. After any grant of probate or letters of administration. no other than the person to whom the Grantee of probate or ad-ministration alone to sue, same shall have been granted, shall have &c., until same revoked. power to sue or prosecute any suit, or otherwise act as representative of the deceased, throughout the province in which the same may have been granted, until such probate or letters of administration shall have been recalled or revoked.
- 261. In any case before the District Judge in which there is contention, the proceedings shall take. Procedure in contentions as nearly as may be, the form of a regucases. lar suit according to the provisions of the Code of Civil Procedure, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who may have appeared as aforesaid to oppose the grant shall be the defendant.
- 262. Where any probate is or letters of administration are revoked, all payments bond fide made to Payment to executor or administrator before probate or any executor or administrator under such administration revoked. probate or administration before the revocation thereof shall, notwithstanding such revocation, be a legal discharge to the person making the same;

and the executor or administrator who shall have acted under any such revoked probate or administration Right of such executor or may retain and reimburse himself in administrator to recoup himself. respect of any payments made by him.

<sup>\*</sup> The words quoted have been inserted by Act VI. of 1881, s. 9. † For rules in force in (1) Assam see Assam Manual of Local Rules and Orders (Ed. 1893), pp. 7 to 9; (2) Burma, see Burma Rules Manual (Ed. 1897), p. 22; and (3) the North-Western Provinces, see North-Western Provinces and Oudh List of Local Rules and Orders (Ed. 1894), p. 32.

<sup>!</sup> See 2 N.-W. P. 268. These references to Act VIII. of 1859 should now be read as applying to Act V. of 1908. See s. 158 of the latter Act.

which the person to whom probate or letters of administration shall be afterwards granted might have lawfully made.

263. Every order made by a District Judge by virtue of the MAppeals from orders of powers hereby conferred upon him shall District Judge. be subject to appeal to the High Court under the rules contained in the Code of Civil Procedure\* applicable to appeals.

Concurrent jurisdiction of High Court. Shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge.

# PART XXXII.+

OF EXECUTORS OF THEIR OWN WRONG.

265. A person who intermeddles with the estate of the decased, or does any other act which belongs to the office of executor while there is no rightful executor or administrator in existence thereby makes himself an executor of his own wrong.

Exceptions.—First.—Intermeddling with the goods of the deceased for the purpose of preserving them, or providing for his funeral, or for the immediate necessities of his family or property, does not make an executor of his own wrong.

Second.—Dealing in the ordinary course of business with goods of the deceased received from another does not make an executor of his own wrong.

- (a) A uses or gives away or sells some of the goods of the deceased, or takes them to satisfy his own debt or legacy, or receives payment of the debts of the deceased. He is an executor of his own wrong.
- (b) A, having been appointed agent by the deceased in his lifetime to collect his debts and sell his goods, continues to do so after he has become aware of his death. He is an executor of his own wrong in respect of acts done after he has become aware of the death of the deceased.

<sup>\*</sup> This reference of Act VIII. of 1859 should now be read as applying to Act V. of 1908.—See s. 158 of the latter Act.

<sup>†</sup> Part XXXII. does not extend to Hindus, Jainas, Sikhs, or Buddhists.
—See the Hindu Wills Act (XXI. of 1870).

- (c) A sues as executor of the deceased, not being such. He is an executor of his own wrong.
- 266. When a person has so acted as to become an executor Liability of executor of his of his own wrong, he is answerable to own wrong. the rightful executor or administrator, or to any creditor or legatee of the deceased, to the extent of the assets which may have come to his hands, after deducting payments made to the rightful executor or administrator, and payments made in a due course of administration.

# PART XXXIII.\*

# OF THE POWERS OF AN EXECUTOR OR ADMINISTRATOR-

237. An executor or administrator has the same powers to sue in respect of all causes of action surviving deceased, and to distrain for all rents due to him at the time of his death, as the deceased had when living.

Demands and rights of action of or against desceased survive to and against executor or administrator.

except causes of action for defamation, assault as defined in the

Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory.

- (a) A collision takes place on a railway in consequence of some neglect or default of the officials, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having brought any action. The cause of action does not survive.
- (b) A sues for divorce. A dies. The case of action does not survive to his representative.

<sup>\*</sup> Part XXXIII. does not extend to Hindus, Jainas, Sikhs, or Bud dhists.—See the Hindu Wills Act (XXI. of 1870). Compare the Probat and Administration Act (V. of 1881), Ch. VI.
† Act XLV. of 1862.

Power of executor or administrator to dispose of property.

269. An executor or administrator has power to dispose of the property of the deceased, either wholly or in part, in such manner as he may think fit.

#### Illustrations.

- (a) The deceased has made a specific bequest of part of his property. The executor, not having assented to the bequest, sells the subject of it. The sale is valid.
- (b) The executor, in the exercise of his discretion, mortgages a part of the immoveable estate of the deceased. The mortgage is valid.
- 270. If an executor or administrator purchases, either directly or indirectly, any part of the property of Purchase by executor or administrator of deceased's the deceased, the sale is voidable at the property. instance of any other person interested in the property sold.
- 271. When there are several executors or administrators, the powers of all may, in the absence of Power of several executors or administrators exerany direction to the contrary, be exerciscisible by one. ed by any one of them who has proved the will or taken out administration.

- (a) One of several executors has power to release a debt due to the deceased.
  - (b) One has power to surrender a release.
- (c) One has power to sell the property of the deceased, moveable or immoveable.
  - (d) One has power to assent to a legacy.
  - (e) One has power to endorse a promissory note payable to the deceased.
- ( / ) The will appoints A, B, C, and D to be executors; and directs that two of them shall be a quorum. No act can be done by a single executor.
- 272. Upon the death of one or more of several executors or administrators, all the powers of Survival of powers on death of one of several exethe office become vested in the survivors cutors or administrators. or survivor.
- 273. The administrator of effects unadministered has, with respect to such effects, the same powers Powers of administrator of effects una ministered. as the original executor or administrator.

Powers of administrator during minority.

274. An administrator during minority has all the powers of an ordinary administrator.

Powers of married execu-

trix or administratrix.

275. When probate or letters of administration have been granted to a married woman, she has all the powers of an ordinary executor or administrator.

### PART XXXIV.\*

OF THE DUTIES OF AN EXECUTOR OR ADMINISTRATOR.

276. It is the duty of an executor to perform the funeral of the deceased in a manner suitable to As to deceased's funeral. his condition if he has left property sufficient for the purpose.

277.†(1) An executor or administrator shall, within six months from the grant of probate or inventory and account. letters of administration, or within such further time as the Court which granted the probate or letters may from time to time appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession. and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character,

and shall in like manner, within one year from the grant or within such further time as the said Court may from time to time appoint, exhibit an account of the estate, showing the assets which have come to his hands, and the manner in which they have been applied or disposed of.

- (2) The High Court may from time to time prescribe the form in which an inventory or account under this section is to be exhibited.
- (3) If an executor or administrator, on being required by the Court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition, he shall be deemed to have committed an offence under section 176 of the Indian Penal Code.

† S. 277 has been substituted for the original one by Act VI. of 1889 S. 7.

<sup>\*</sup> Part XXXIV. does not extend to Hindus, Jainas, Sikhs, or Bud. dhists .- See the Hindu Wills Act (XXI. of 1870). Compare the Probate and Administration Act V. of (1881); Ch. VII.

- (4) The exhibition of an intentionally false inventory or account under this section shall be deemed to be an offence under section 193 of that Code.
- 277A.\* In all cases where a grant has been made of proInventory to include probate or letters of administration intended to have effect throughout the whole
  of British India, the executor, or administrator shall include in the inventory of the effects of the deceased
  all his moveable or immoveable property situate in British India,
  and the value of such property situate in each province shall be
  separately stated in such inventory, and the probate or letters of
  administration shall be chargeable with a fee corresponding to the
  entire amount or value of the property affected thereby wheresoever situate within British India.
- 278. The executor or administrator shall collect, with reason-As to property of, and able diligence, the property of the dedebts owing to, deceased. ceased, and the debts that were due to him at the time of his death.
- 279. Funeral expenses to a reasonable amount, according to Expenses to be paid the decree and quality of the deceased, before all debts.

  and death-bed charges, including feesfor medical attendance, and board and lodging for one month previous to his death, are to be paid before all debts.
- 280. The expenses of obtaining probate or letters of admi-Expenses to be paid next nistration, including the costs incurred after such expenses. for or in respect of any judicial proceedings that may be necessary for administering the estate, are to be paid next after the funeral expenses and death-bed charges.
- 281. Wages due for services rendered to the deceased within Wages for certain services three months next preceding his death to be next paid, and then by any labourer, artisan, or domestic servant, are next to be paid, and then the other debts of the deceased.
- 282. Save as aforesaid, no creditor is to have a right of prior-Save as aforesaid, all ity over another by reason that his death debts to be paid equally and is secured by an instrument under seal, rateably, or on any other account.

<sup>\*</sup> S. 277A has been inserted by Act VIII. of 1903, s. 2 (7).

in British India.

But the executor or administrator shall pay all such debts\* as he knowst of, including his own, equally and rateably, as far as the assests of the deceased will extend.

Application of moveable property to payment of debts where domicile not

283. If the domicile of the deceased was not in British India. the application of his moveable property to the payment of his debts is to be regulated by the law of "British India."

Creditor paid in part under section 283 to bring payment into account before sharing in proceeds of immoveable property.

284. No creditor who has received payment of a part of his debt by virtue of the last preceding section shall be entitled to share in the proceeds of the immoveable estate of the deceased unless he brings such payment into account for the benefit of the other creditors.

#### Illustration.

A dies, having his domicile in a country where instruments under seal have priority over instruments not under seal, leaving moveable property to the value of 5,000 rupees and immoveable property to the value of 10,000 rupees, debts on instruments under seal to the amount of 10,000 rupees, and debts on instruments not under seal to the same amount. The creditors holding instruments under seal receive half of their debts out of the proceeds of the moveable estate. The proceeds of the immoveable estate are to be applied in payment of the debts on instruments not under seal until one half of such debts has been discharged This will leave 5,000 rupees. which are to be distributed rateably amongst all the creditors without distinction in proportion to the amount which may remain due to them.

Debts to be paid before legacies.

285. Debts of every description must be paid before any legacy.

286. If the estate of the deceased is subject to any contingent liabilities, an executor or administrator Executor or administrator not bound to pay legacies is not bound to pay any legacy without without indemnity. a sufficient indemnity to meet the liabilities whenever they may become due.

<sup>\*</sup> A liability to pay calls is a debt.—8 Bom., O. C. J., 20. † i. e., actually, not constructively. - 8 Bom., O. C. J., 20.

<sup>1 8</sup> Bom., O. C. J., 20.

<sup>§</sup> The words quoted have been substituted for the words "the country in which he was domiciled" by Act VI. of 1889, s. 9, cl. (1): and the illustration originally attached to this section has been repealed by cl. (2) of the same section.

S. 284, together with its illustration, seems to be an anomaly after the amendment of s. 283.

287. If the assets, after payment of debts, necessary expenses, and specific legacies, are not sufficient Abatement of general legacies. to pay all the general legacies in full, the latter shall abate or be diminished in equal proportions,

Executor not to pay one legatee in preference to another.

and the executor has no right to pay one legatee in preference to another, nor to retain any money on account of a legacy to himself, or to any person for whom he is a trustee.

Non-abatement of specific legacy when assets sufficient to pay debts.

288. Where there is a specific legacy, and the assets are sufficient for the payment of debts and necessary expenses, the thing specified must be delivered to the legatee without any abatement.

Right under demonstrative legacy when assets sufficient to pay debts and necessary expenses.

289. Where there is a demonstrative legacy, and the assets are sufficient for the payment of debts and necessary expenses, the legatee has a preferential claim for payment of his legacy out of the fund from which the

legacy is directed to be paid until such fund is exhausted, and, if, after the fund is exhausted, part of the legacy still remains unpaid. he is entitled to rank for the remainder against the general assets as for a legacy of the amount of such unpaid remainder.

290. If the assets are not sufficient to answer the debts and Rateable abatement of the specific legacies, an abatement shall specific legacies. be made from the latter rateably in proportion to their respective amounts.

# Illustration.

A has bequeathed to B a diamond ring, valued at 500 rupees, and to C a horse, valued at 1,000 rupees. It is found necessary to sell all the effects of the testator, and his assets after payment of debts, are only 1,000 rupees. Of this sum rupees 333-5-4 are to be paid to B, and rupees 666-10-8 to C.

291. For the purpose of abatement, a legacy for life, a sum Legacies treated as general appropriated by the will to produce an annuity, and the value of an annuity, for purpose of abatement. when no sum has been appropriated to produce it, shall be treated as general legacies.

# PART XXXV.\*

# OF THE EXECUTOR'S ASSENT TO A LEGACY.

Assent necessary to complete legatee's title.

292. The assent of the executor is necessary to complete a legatee's title to his legacy.

#### Illustrations.

- (a) A by his will bequeaths to B his Government Paper, which is in deposit with the Bank of Bengal. The bank has no authority to deliver the securities, nor B a right to take possession of them, without the assent of the executor.
- (b) A by his will has bequeathed to C his house in Calcutta in the tenancy of B, C, is not entitled to receive the rents without the assent of the executor.
- 293. The assent of the executor to a specific bequest shall Effect of executor's as- be sufficient to divest his interest as sent to specific legacy. executor therein, and to transfer the subject of the bequest to the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way.

Nature of assent.

This assent may be verbal, and it may be either express or implied from the conduct of the executor.

- (a) A horse is bequeathed. The executor requests the legate to dispose of it, or a third party proposes to purchase the horse from the executor, and he directs him to apply to the legatee. Assent to the legacy is implied.
- (b) The interest of a fund is directed by the will to be applied for the maintenance of the legatee during his minority. The executor commences so to apply it. This is an assent to the whole of the bequest.
- (c) A bequest is made of a fund to A, and after him to B. The executor pays the interest of the fund to A. This is an implied assent to the bequest to B.
- (d) Executors die after paying all the debts of the testator, but before satisfaction of specific lgacies. Assent to the legacies may be presumed.
- (e) A person to whom a specific article has been bequeathed takes possession of it, and retains it without any objection on the part of the executor. His assent may be presumed.

<sup>\*</sup> Part XXXV. does not extend to Hindus, Jainas, Sikhs or Buddhists.—See the Hindu Wills Act (XXI. of 1870). Compare the Probate and Administration Act (V. of 1881), Ch. VIII.

294. The assent of an executor to a legacy may be conditional assent.

Conditional assent.

tional and if the contition be one which he has a right to enforce, and it is not performed, there is no assent.

#### Illustrations.

(a) A bequeaths to B his lands of Sultanpur, which, at the date of the will, and at the death of A, were subject to a mortgage for 10,000 rupees. The executor assents to the bequest on condition that B shall, within a limited time, pay the amount due on the mortgage at the testator's death. The amount is not paid. There is no assent.

(b) The executor assents to a bequest on condition that the legatee shall pay him a sum of money. The payment is not made. The assent is nevertheless valid.

295. When the executor is a legatee, his assent to his own Assent of executor to his legacy is necessary to complete his title own legacy.

to it in the same way as it is required when the bequest is to another person, and his assent may in like manner be expressed or implied.

Assent shall be implied if, in his manner of administering the property, he does any act which is referable to his character of legatee, and is not referable to his character of executor.

#### Illustration.

An executor takes the rent of a house, or the interest of Government securities bequeathed to him, and applies it to his own use. This is assent.

Effect of executor's assent.

296. The assent of the executor to a legacy gives effect to it from the death of the testator.

# Illustrations.

(a) A legatee sells his legacy before it is assented to by the executor. The executor's subsequent assent operates for the benefit of the purchaser, and completes his title to the legacy.

(b) A bequeaths 1,000 rupees to B with interest from his death. The executor does not assent to his legacy until the expiration of a year from A's death. B is entitled to interest from the death of A.

297. An executor is not bound to pay or deliver any legacy

Executor when to deliver until the expiration of one year from the legacies.

testator's death.

#### Illustration.

A by his will directs his legacies to be paid within six months after his death. The executor is not bound to pay them before the expiration of a year.

# PART XXXVI.\*

OF THE PAYMENT AND APPORTIONMENT OF ANNUITIES.

298. Where an annuity is given by the will, and no time is Commencement of an-fixed for its commencement, it shall nuity when no time fixed by commence from the testator's death, and the first payment shall be made at the expiration of a year next after that event.

When annuity, to be paid quarterly or monthly, the first payment quarterly or monthly, first shall be due at the end of the first quarter or first month, as the case may be, after the testator's death; and shall, if the executor think fit, be paid when due, but the executor shall not be bound to pay it till the end of the year.

Dates of successive payments when first payment of an annuity shall be made within one month or any other division of time from the death of the testator, or on a day certain, the successive payments are to be made on the anniversary of the earliest day on

which the will authorizes the first payment to be made;

and, if the annuitant should die in the interval between the Apportionment where annuitant dies between times of payment, an apportioned share of the annuity shall be paid to his representative.

<sup>\*</sup> Part XXXVI. does not extend to Hindus, Jainas, Sikhs or Buddhists.—See the Hindu Wills Act (XXI. of 1870). Compare the Probate and Administration Act (V. of 1881), Ch. IX.

# PART XXXVII.\*

ON THE INVESTMENT OF FUNDS TO PROVIDE FOR LEGACIES.

301. Where a legacy, not being a specific legacy, is given for life, the sum bequeathed shall, at the Investment of sum bequeathed where legacy, not end of the year, be invested in such specific, given for life. securities as the High Court may, by any general rule to be made from time to time, authorize or direct, and the proceeds thereof shall be paid to the legatee as the same shall accrue due.

Investment of general time.

302. Where a general legacy is given to be paid at a future time, the executor shall invest a sum legacy to be paid at future sufficient to meet it in securities of the kind mentioned in the last preceding section.

Intermediate interest.

The intermediate interest shall form part of the residue of the testator's estate.

Procedure when no fund charged with, or appropriated for annuity.

303. Where an annuity is given, and no fund is charged with its payment, or appropriated by the will to answer it, a Government annuity of the specified amount shall be purchased; or

if no such annuity can be obtained, then a sum sufficient to produce the annuity shall be invested for that purpose in such securities as the High Court may by any general rule to be made from time to time, authorize or direct.

304. Where a bequest is contingent, the executor is not bound to invest the amount of the to residuary Transfer legatee of contingent belegacy, but may transfer the whole request. sidue of the estate to the residuary legatee on his giving sufficient security for the payment of the legacy if it shall become due.

Investment of residue bequeathed for life, without direction to invest in particular securities.

305. Where the testator has bequeathed the residue of his estate to a person for life without any direction to invest it in any paricular securities, so much thereof as is not at the time of the testator's decease invested

<sup>\*</sup> Part XXXVII. does not extend to Hindus, Jainas, Sikhs, or Buddhists—See the Hindu Wills Act (XXI. of 1870). Compare the Probate and Administration Act (V. of 1881), Ch. X.

in such securities as the High Court may for the time being regard as good securities shall be converted into money, and invested in such securities.

306. Where the testator has bequeathed the residue of his investment of residue bequeathed for life, with direction to invest in specified securities, so much of the estate as is not at the time of his death invested in securities of the specified kind shall be converted into money, and

invested in such securities.

307. Such conversion and investment as are contemplated by
Time and manner of contemplated by
the two last preceding sections shall be
version and investment. made at such times and in such manner
as the executor shall in his discretion think fit;

and, until such conversion and investment shall be completed,
Interest payable until investment. the person who would be for the time
being entitled to the income of the fund
when so invested shall receive interest at the rate of four per cent.
per annum upon the market-value (to be computed as of the date
of the testator's death) of such part of the fund as shall not yet
have been so invested.

Procedure where minor entitled to immediate paysment or possession of the money or thing bequeathed, but is a mior, and there is no direction in the executor or administrator shall pay or deliver the same into the Court of the District Judge, by whom "or by whose District Delegate" the probate was, or letters of

"or by whose District Delegate" the probate was, or letters of administration with the will annexed were, granted to the account of the legatee unless the legatee be a ward of the Court of Wards;

and, if the legatee be a ward of the Court of Wards, the legacy shall be paid into that Court to his account: and such payment into the Court of the District Judge, or into the Court of Wards, as the case may be, shall be a sufficient discharge for the money so paid:

and such money, when paid in, shall be invested in the purchase of Government securities, which, with the interest thereon,

<sup>\*</sup> In s 308, the words quoted have been inserted by s. 8 of Act VI. of 1881.

shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, as the Judge or the Court of Wards. as the case may be, may direct.

# PART XXXVIII.\*

OF THE PRODUCE AND INTEREST OF LEGACIES.

Legatee's title to produce of specific legacy.

309. The legatee of a specific legacy is entitled to the clear produce thereof, if any, from the testator's death.

Exception.- A specific bequest, contingent in its terms, does not comprise the produce of the legacy between the death of the testator and the vesting of the legacy. The clear produce of it forms part of the residue of the testator's estate.

#### Illustrations.

- (a) A bequeaths his flock of sheep to B. Between the death of A and delivery by his executor, the sheep are shorn, or some of the ewes produce lambs. The wool and lambs are the property of B.
- (b) A bequeaths his Government securities to B, but postpones the delivery of them till the death of C. The interest which falls due between the death of A and the death of C belongs to B, and must, unless he is a minor, be paid to him as it is received.
- (c) The testator bequeaths all his four per cent. Government promissory notes to A when he shall complete the age of 18. A, if he complete that age, is entitled to receive the notes, but the interest which accrues in respect of them, between the testator's death and A's completing 18. forms part of the residue.
- 310. The legatee under a general residuary bequest is enti-Residuary legatee's title tled to the produce of the residuary fund to produce of residuary fund. from the testator's death.

Exception.-A general residuary bequest, contingent in its terms, does not comprise the income which may accrue upon the fund bequeathed between the death of the testator and the vesting of the legacy. Such income goes as undisposed of.

<sup>\*</sup> Part XXXVIII. does not extend to Hindus, Jainas, Sikhs, and Buddhists .- See the Hindu Wills Act (XXI. of 1870). Compare the Probate and Administration Act (V. of 1881), Ch. XI.

#### Illustrations.

- (a) The testator bequeaths the residue of his property to A, a minor, to be paid to him when he shall complete the age of 18. The income from the testator's death belongs to A.
- (b) The testator bequeaths the residue of his property to A, when he shall complete theage of 18. A, if he complete that age, is entitled to receive the residue. The income which has accrued in respect of it since the testator's death goes as undisposed of.
- 311. Where no time has been fixed for the payment of a Interest when no time general legacy, interest begins to run fixed for payment of general legacy.

  from the expiration of one year from the testator's death.

Exceptions.—(1) Where the legacy is bequeathed in satisfaction of a debt, interest runs from the death of the testator.

- (2) When the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, the legacy shall bear interest from the death of the testator.
- (3) Where a sum is bequeathed to a minor with a direction to pay for his maintenance out of it, interest is payable from the death of the testator.
- 812. Where a time has been fixed for the payment of a Interest when time fixed. general legacy, interest begins to run from the time so fixed. The interest up to such time forms part of the residue of the testator's estate.

Exception.—Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, and the legatee is a minor, the legacy shall bear interest from the death of the testator unless a specific sum is given by the will for maintenance.

Rate of interest.

313. The rate of interest shall be four per cent. per annum.

814. No interest is payable on the arrears of an annuity No interest on arrears of within the first year from the death of annuity within first year after the testator although a period earlier than the expiration of that year may have been fixed by the will for making the first payment of the annuity.

315. Where a sum of money is directed to be invested to Interest on sum to be inproduce an annuity, interest is payable vested to produce annuity. on it from the death of the testator.

# PART XXXIX.\*

# OF THE REFUNDING OF LEGACIES.

- 816. When an executor has paid a legacy under the order Refund of legacy paid unof a Judge he is entitled to call upon the legatee to refund in the event of the assets proving insufficient to pay all the legacies.
- 817. When an executor has voluntarily paid a legacy, he
  No refund if paid voluncannot call upon a legatee to refund
  tarily. in the event of the assets proving insufficient to pay all the legacies.
- Refund when legacy has become due on performance of condition within further time allowed under section 124.

  Refund when legacy has ance of a condition has elapsed without the condition having been performed, and the executor has thereupon, without fraud, distributed the assets; in such case, if further time has been allowed under section 124 for the performances of the condition, and the condition has been performed accordingly, the legacy cannot be claimed from the executor, but those to whom he has paid it are liable to refund the amount.
- 319. When the executor has paid away the assets in legacies, When each legatee com- and he is aftewards obliged to dispellable to refund in proportion.

  charge a debt of which he had no previous notice, he is entitled to call upon each legatee to refund in proportion.
- 320. Where an executor or administrator has given such notices as would have been given by the High Court in an administration-suit for creditors and others to send in to him their claims against the estate of the deceased, he shall, at the expiration of the time

<sup>\*</sup> Part XXXIX. does not extend to Hindus, Jainas, Sikhs, or Buddhists.—See the Hindus Wills Act (XXI. of 1870). Compare the Probate and Administration Act (V. of 1881), Ch. XII.

therein named for sending in claims, be at liberty to distribute the assets,\* or any part thereof, in discharge of such lawful claims as he knows of, and shall not be liable for the assets so distributed to any person of whose claim he shall not have had notice at the time of such distribution;

but nothing herein contained shall prejudice the right of any Creditor may follow as- creditor or claimant to follow the assets sets. or any part thereof in the hands of the persons who may have received the same respectively.

Greditor may call upon may; call upon a legatee who has relegatee to refund.

whether the assets of the testator's estate were or were not sufficient at the time of his death to pay both debts and legacies; and whether the payment of the legacy by the executor was voluntary or not.

When legater not satisfied, or compelled to refund under section 321, cannot oblige one paid in full to refund.

When legater not satisfied, or compelled to refund under section 321, cannot oblige one paid in full to refund under the last preceding section, cannot oblige one who has received payment in full to refund, whether the legacy were paid to him with or without suit, although the assets have subsequently become

When unsatisfied legatee at the time of the testator's death, a must first proceed against executor if solvent.

on a satisfied legatee to refund, first proceed against the executor if he is solvent; but, if the executor is insolvent or not liable to pay, the unsatisfied legatee can oblige each satisfied legatee to refund in proportion.

† In s. 321, certain words, repealed by Act XV. of 1877, have here, been omitted.

<sup>\*</sup> For limitation of suits to compel a refund, see Act IX. of 1908 First Schedule, No. 43.

824. The refunding of one legatee to another shall not Limit of refunding of exceed the sum by which the satisfied legacy ought to have been reduced if one legatee to another. the estate had been properly administered.

#### Illustration.

A has bequeathed 240 rupees to B, 480 rupees to C, and 720 rupees to D. The assets are only 1,200 rupees, and, if properly administered, would give 200 rupees to B, 400 rupees to C, and 600 rupees to D. C and D have been paid their legacies in full, leaving nothing to B. B can oblige C to refund 80 rupees, and D to refund 120 rupees.

Refunding to be without

325. The refunding shall, in all cases, be without interest.

Residue after usual payments to be paid to residuary legatee.

326. The surplus or residue of the deceased's property, after payment of debts and legacies, shall be paid to the residuary legatee when any has been appointed by the will.

Transfer of assets from British India to executor or administrator in country of domicile for distribution.

326A.\* Where a person not having his domicile in British India has died leaving assets both in British India and in the country in which he had his domicile at the time of his death.

and there have been a grant of probate or letters of administration in British India with respect to the assets there, and a grant of administration in the country of domicile with respect to the assets in that country,

the executor or admininistrator, as the case may be, in British India, after having given such notices as are mentioned in section 320, and after having discharged, at the expiration of the time therein named, such lawful claims as he knows of,

may, instead of himself distributing any surplus or residue of the deceased's property to persons residing out of British India who are entitled thereto, transfer, with the consent of the executor or administrator, as the case may be, in the country of domicile, the surplus or residue to him for distribution to those persons.

<sup>\*</sup> S. 326A has been inserted by Act II, of 1800, s. o.

# PART XL.\*

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR FOR DEVASTATION.

327. When an executor or administrator misapplies the estate

Liability of executor or of the deceased, or subjects it to loss or

administrator for devastadamage, he is liable to make good the
loss or damage, so occasioned.

#### Illustrations.

- (a) The executor pays out of the estate an unfounded claim. He is liable to make good the loss.
- (b) The deceased had a valuable lease renewable by notice, which the executor neglects to give at the proper time. The executor is liable to make good the loss.
- (c) The deceased had a lease of less value than the rent payable for it but terminable on notice at a particular time. The executor neglects to give the notice. He is liable to make good the loss.
- 328. When an executor or administrator occasions a loss to

  Liability of executor or the estate by neglecting to get in any
  administrator for neglect to
  get in any part of property.

  is liable to make good the amount.

#### Illustrations.

- (a) The executor absolutely releases a debt due to the ideceased from a solvent person, or compounds with a debtor who is able to pay in full. The executor is liable to make good the amount.
- (b) The executor neglects to sue for a debt till the debtor is able to plead the Act for the limitation of suits, and the debt is thereby lost to the estate. The executor is liable to make good the amount.

# PART XLI.†

# MISCELLANEOUS.

- 329. [Stamps and Fees].—Repealed by Lct VII. of 1870.
- 330. [Saving as to Administrator-General].—Repealed by Act XXIV. of 1867.

† Part XII. does not extend to Hindus, Jainas, Sikhs, or Buddhists — See the Hindu Wills Act (XXI. of 1870).

Part XL. does not extend to Hindus, Jainas, Sikhs, or Buddhists.— See the Hindu Wills Act (XXI. of 1870). Compare the Probate and Administration Act (V. of 1881), Ch XIII.

331 The provisions of this Act shalf not apply to intestate or

Succession to property of Hindus, &c., and certain wills, intestacies, and marriages not affected.

testamentary succession to the property of any Hindu, Mahomedan, or Buddhists,\* nor shall they apply to any will made, or any intestacy occurring, before the first day of January 1866.

The 4th section shall not apply to any marriage contracted before the same day.

332. The Governor-General of India in Council shall, from

Power of Governor-General in Council to exempt any race, sect, or tribe in British India from operation of Act.

time to time, have power, by an order, either retrospectively from the passing of this Act, or prospectively, to exempty from the operation of the whole or any part of this Act the members of any race,

sect, or tribe in British India, or any part of such race, sect. or tribe, to whom he may consider it impossible or inexpedient to apply the provisions of this Act, or of the part of the Act mentioned in the order.

The Governor-General of India in Council shall also have power from time to time to revoke such order, but not so that the revocation shall have any retrospective effect.

As to intestate succession among Parsis, see the Parsi Succession Act (XXI. of 1865).

As to moveable property under Rs. 200 in value of persons dying intestate in a Presidency-town, when taken charge of by the Police for safe custody, see the Administrator Generals Act (II. of 1874).

As to probate and letters of administration in the case of Hindus. Mahomedans and Buddhists and persons exempted under s. 332, see the Probate and Administration Act (V. of 1881).

† The following classes have been exempted from the operation of the whole of the Act retrospectively from the passing of the Act, vis.

all Native Christians in the Province of Coorg-see Notification No. 204, dated 23rd July 1868, in Gasette of India, 1868, p. 1094:

the Jews of Aden-see Notification No. 1651, dated 20th November

1886. Bombay List of Local Rules and Orders Ed., 1886, p. 2;

the members of the races known as Khasias and Syntengs (dwelling in the Chief Commissioner-ship of Assam)-see Notification No. 1671, dated 20th October 1887, Assam List of Local Rules and Orders, Ed. 1893, p. 6.

As to probate and letters of administration in the case of persons so exempted, see the Probate and Administration Act (V. of 1881).

<sup>\*</sup> As to wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal and the towns of Madras and Bombay, see now the Hindu Wills Act (XXI. of 1870), as amended by Act V. of 1881, s. 154.

All orders and revocations made under this section shall be published in the Gazette of India.

338.\* (1) When a grant of probate or letters of administra-Surrender of revoked probate or letters of administration. Act, the person to whom the grant was made shall forthwith deliver up the probate or letters to the Court which made the grant.

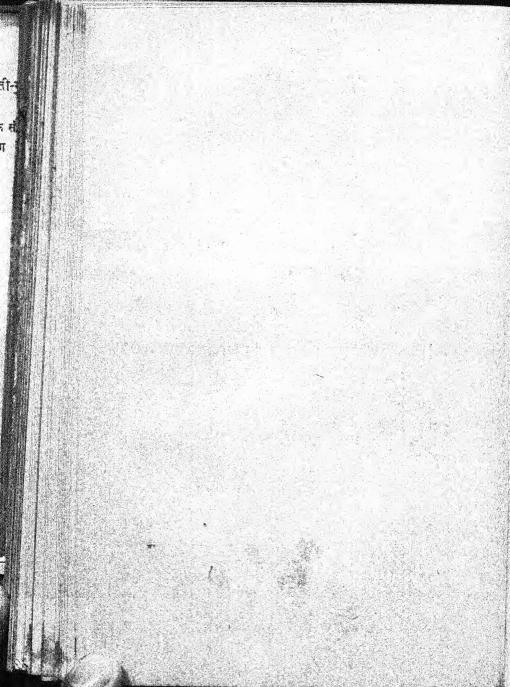
(2) If such person wilfully and without reasonable cause omits so to deliver up the probate or letters, he shall be punished with fine which may extend to one thousand rupees, or with imprisonment of either description for a term which may extend to three months, or with both.

#### SCHEDULE.

(Stamps and Fees.)

[Repealed by Act VII. of 1870.]

\* S. 333 has been added by Act VI. of 1889, s. 10.



# ACT NO. V. OF 1881.

# The Probate and Administration Act, 1881.

[As amended up to December, 1916.]

## CONTENTS.

PREAMELE.

#### CHAPTER I.

PRELIMINARY.

#### SECTIONS.

- Short title. Local extent. Commencement.
- 2. Personal application.
- 3. Interpretation clause.

### CHAPTER II.

- OF GRANT OF PROBATE AND LETTERS OF ADMINISTRATION.
  - Character and property of executor or administrator as such.
  - Administration with copy annexed of authenticated copy of will proved abroad.
  - Probate only to appointed executor.
  - 7. Appointment express or implied.8. Persons to whom probate cannot
- be granted.

  Grant of probate to several executors simultaneously, or at different times.
- Separate probate or codicil discovered after grant of probate. Procedure when different executors appointed by codicil.
- ir. Accrual of representation to surviving executor.
- 12. Effect of probate.
- To whom administration may not—granted.

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### SECTIONS.

- 14. Effect of letters of administra-
- 15. Acts not validated by administration.
- Grant of administration where executor has not renounced. Execution,
- Form and effect of renunciation of executorship.
- Procedure where executor renounces or fails to accept within time limited.
- 19. Grant of administration to universal or residuary legatee.
- Right to administration of representative of deceased residuary legatee.
- 21 Grant of administration where no executor, nor residuary legatee, nor representative of such legatee.
- Citation before grant of administration to legatee other than universal or residuary.
- 23. To whom administration may be granted.

# CHAPTER III.

OF LIMITED GRANTS.

- (a.) Grants limited in Duration.
- 24. Probate of copy or draft of lost will.
- 25. Probate of contents of lost or destroyed will.

Act V., 1881.-1.

T

#### SECTIONS.

- 26. Probate of copy where original exists.
- Administration until will produced.
- (b.) Grants for the Use and Benefit of Others having Right.
- 28. Administration with will annexed to attorney of absent executor.
- 29. Administration with will annexed to attorney of absent person, who, if present, would be entitled to administer.
- 30. Administration to attorney of absent person entitled to administer in case of intestacy.
- 31. Administration during minority of sole executor or residuary legatee.
- 32. Administration during minority of several executors or residuary legatees
- 33. Administration for use and benefit of lunatic.
- 34. Administration pendente lite.
- (c.)—For Special Purposes.

  35. Probate limited to purpose
- specified in will. 36. Administration with will annexed limited to particular purpose
- 37. Administration limited to trustproperty.
- 38. Administration limited to suit.
- Administration limited to purpose of becoming party to suit to be brought against executor or administrator.
- Administration limited to collection and preservation of deceased's property.
- 41. Appointment, as administrator, of person other than one who, under ordinary circumstances, would be entitled to administration.

# (d.)-Grants with Exception.

42. Probate or administration with will annexed subject to exception.

#### SECTIONS.

- 43. Administration with exception.
  - (e.) Grants of the Rest.
- 44. Probate or administration of rest.
- (f.)—Grants of Effects unadmir istered.
- 45. Grant of effects unadministered.
- 46. Rules as to grants of effects unadministered.
- Administration when limited grant expired, and still some part of estate unadministered

#### CHAPTER IV.

# ALTERATION AND REVOCATION OF GRANTS

- 48 What errors may be rect fied by Court.
- 49. Procedure where codicil discovered after grant of administration with will annexed.
- 50. Revocation or annulment for just cause.
  " Just cause."

## CHAPTER V.

- OF THE PRACTICE IN GRANTING AND REVOKING PROBATES AND LETTERS OF ADMINISTRATION.
  - Jurisdiction of District Judge in granting and revoking probates, &c.
  - 52 Power to appoint Delegate of District Judge to deal with non-contentious cases.
  - District Judge's power as to grant of probate and administration.
- District Judge may order person to produce testamentary papers.
- 55. Proceedings of District Judge's Court in relation to probate and administration.

## SECTIONS.

56. When probate or administration may be granted by District Judge.

57. Disposal of application made to Judge of District in which deceased had no fixed abode.

58. Probate and letters of administration may be granted by Delegate.

59. Conclusiveness of probate or letters of administration. Effect of unlimited probates,&c.

granted by certain Courts. 50. Transmission to other Courts of certificate by Court granting unlimited probate, &c.

61. Conclusiveness of application for probate or administration, if properly made and verified.

62. Petition for probate.

53. In what cases translation of will to be annexed to petition. Verification of translation by person other than Court translator.

54. Petition for letters of administra-

55. Additional statements in petition for probate, &c.

56. Petition for probate or administration to be signed and verified 57. Verification of petition for pro-

bate by one witness to will.

68. Punishment for false averment in petition or declaration.

69. District Judge may examine petitioner in person, require further evidence, and issue citations to inspect proceedings.

Publication of citation.

70. Caveates against grant of probate or administration.

71. Form of caveat.

72. After entry of caveat, no proceeding taken on petition until after notice to caveator.

73. District Delegate when not to grant probate or administration.

#### SECTIONS.

74. Power to transmit statement to District Judge in doubtful cases where no contention.

75. Procedure where there is contention, or District Delegate thinks probate or letters of administration should be refused in his Court.

76. Grant of probate to be under seal of Court.

Form of such grant.

77. Grant of letters of administration to be under seal of Court. Form of such grant.

78. Administration-bond.

79 Assignment of administrationbond,

80. Time before which probate or administration shall not be granted.

St. Filing of original wills of which probate or administration with will annexed granted

82. Grantee of probate or administration alone to sue, &c., until same rev. ked.

83. Procedure in contentious cases. 84. Payment to executor or administrator before probate or ad-

ministration revoked. Right of such executor or ad-

ministrator, to recoup himself. 85. Power to refuse letter of administration,

86. Appeals from orders of District udge.

87. Concurrent jurisdiction of High Court.

# CHAPTER VI.

OF THE POWERS OF AN EXECUTOR OR ADMINISTRATOR.

88. In respect of causes of action surviving deceased, and debts due at death.

89. Demands and rights of suit of or against deceased survive to and against executor or administrator,

I

## SECTIONS.

- go. Power of executor or administrator to dispose of property.
- Purchase by executor or administrator of deceased's property.
- 32. Powers of several executors or administrators exercisable by one.
- 93. Survival of power on death of one of several executors or administrators.
- Powers of administrator of effects unadministered.
- 95. Powers of administrator during minority.
- 96. Powers of married executrix or administratrix.

### CHAPTER VII.

- OF THE DUTIES OF AN EXECUTOR OR ADMINISTRATOR.
- 97. As to deceased's funeral ceremonies.
- oS. Inventory and account.
- 99. Inventory to include property in any part of British India.
- 100. As to property of, and debts owing to, deceased.
- ror. Expenses to be paid before all debts.
- 102. Expenses to be paid next after such expenses.
- 103. Wages for certain services to be next paid, and then other
- 104. Save as aforesaid, all debts to be paid equally and rateably.
- be paid equally and rateably.

  105. Debts to be paid before lega-
- 106. Executor or administrator not bound to pay legacies without indemnity.
- 207. Abatement of general legacies.

  Executor not to pay one legatee
  in preference to another.
- 108. Non-abatement of specific legacy when assets sufficient to pay debts.

### SECTIONS.

- 100. Right under demonstrative
  legacy when assets sufficient
  to pay debts and necessary
  expenses
- 110. Rateable abatement of specific legacies.
- Legacies treated as general for purpose of abatement.

### CHAPTER VIII.

- OF THE EXECUTOR'S ASSENT TO A LEGACY.
- 112. Assent necessary to complete legatee's title.
- 113. Effect of executor's assent to specific legacy.
  Nature of assent.
- 114. Conditional assent.
- 115. Assent of executor to his own legacy
  Implied assent.
- 116. Effect of executor's assent.
  - 117. Executor when to deliver lega-

## CHAPTER IX.

- OF THE PAYMENT AND APPORTION-MENT of ANNUITIES.
- 118. Commencement of annuity when no time fixed by will.
- 119. When annuity, to be paid quarterly or monthly, first falls due.
- 120. Date of successive payments when first payment directed to be made within given time, or on day certain.
  - Apportionment where annuitant dies between times of payment.

## CHAPTER X.

- OF THE INVESTMENT OF FUNDS TO PROVIDE FOR LEGACIES.
- Investment of sum bequeathed where legacy, not specific, given for life.

#### SECTIONS.

- 122. Investment of general legacy to be paid at future time. Intermediate interest.
- 123. Procedure when no fund charged with, or appropriated to annuity.
- 124. Transfer to residuary legatee of contingent bequest.
- 125. Investment of residue bequeathed for life, with direction to invest in specified securities.
- 2.26. Time and manner of conversion and investment. Interest payable until investment.
- 227. Poocedure where minor entitled to immediate payment or possession of bequest, and no direction to pay to person on his behalf.

## CHAPTER XI.

# OF THE PRODUCE AND INTEREST OF LEGACIES.

- 328. Legatee's title to produce of specific legacy.
- 129. Residuary legatee's title to produce of residuary fund.
- Interest when no time fixed for payment of general legacy.
   Interest when time fixed.
- 132. Rate of interest.
- 133. No interest on arrears of annuity within first year after testator's death.
- 134. Interest on sum to be invested to produce annuity.

# CHAPTER XII.

- OF THE REFUNDING OF LEGACIES.
- 335. Refund of legacy paid under Judge's orders.
- 136. No refund if paid voluntarily.
- Refund when legacy becomes due on performance of condition within further time allowed.

## SECTIONS.

- 138. When each legatee compellable to refund in proportion.
- 139. Distribution of assets Creditor may follow assets.
- Creditor may call upon legatee to refund.
- 141. When legatee not satisfied or compelled to refund under section 140, cannot oblige one paid in full to refund.
- 142. When unsatisfied legatee must first proceed against executor, if solvent.
- 143. Limit to refunding of one legatee to another.
- 144. Refunding to be without interest.
- 145. Residue after usual payments to be paid to residuary legatee.
- 145A. Transfer of assets from British India to executor or administrator in country of domicile for distribution.

# CHAPTER XIII.

- OF THE LIABILITY OF AN EXECUTOR
  OR ADMINISTRATOR FOR DEVASTATION.
- 146. Liability of executor or administrator for devastation.
- 147. Liability for neglect to get in any part of property.

# CHAPTER XIV

# MISCELLANEOUS.

- 148. Provisions applied to administrator with will annexed.
- 149. Saving clause.
- 150. Probate and administration in case of persons exempted from Succession Act, to be granted only under this Act.
- 151. [Repeal of portions of Act XXVII. of 1860.] Repealed by the Succession Certificate Act (VII. of 1880).

71

### SECTIONS.

- 152. Grant of probate or administration to supersede certificate under Act XXVII. of 1860, or Bombay Regulation VIII. of 1827.
- 153. [Amendment of Court Fees Act (VII. of 1870).] Repealed by the Succession Certificate Act (VII. of 1889).

### SECTIONS.

- 154. Amendment of Hindu Wills Act, 1870.
- 155. Validation of grants of probate and administration made in Lower Burma.
- 156. Amendment of Limitation Acta
- 157. Surrender of revoked probate or letters of administration.

# ACT NO. V. OF 1881:

The Probate and Administration Act, 1881.\*

RECEIVED THE G.-G'S ASSENT ON THE 21ST JANUARY 1881.

An Act to provide for the Grant of Probates of Wills and Letters of Administration to the Estate of certain Deceased Persons.

Whereas it is expedient to provide for the grant of Probate of wills and letters of administration to the estates of deceased persons in cases to which the Indian Succession Act, 1865,† does not apply; It is hereby enacted as follows:—

## CHAPTER I.

## PRELIMINARY.

Short title.

1. This Act may be called the Probate and Administration Act, 1881:

It applies to the whole of British India:

Local extent.

Commencement.

and it shall come into force on the first day of April 1881.

\* For Statement of Objects and Reasons, see Gazette of India, 1879, Pt. V., p. 763; for the First Report of the Select Committee, see ibid, 1880, Pt. V., p. 35; for Discussions in Council, see ibid, 1879, supplement, pp. 593 and 743; 1880, pp. 515, 556; and ibid, 1881, pp. 10, 47, and 87.

Act V. of 1881 has been declared in force in the town of Mandalay by the Upper Burma Laws Act (XX. of 1886), s. 6; and in British Baluchistan by the British Baluchistan Laws Regulation (I. of 1890), s. 3; and ss. 153 and 154 of the Act have been declared in force in the Santhal Parganas by the Santhal Parganas Settlement Regulation (III. of 1872), s. 3, as amended by the Santhal Parganas Laws Regulation (III. of 1886), s. 2.

It has been declared under s. 2 (a) of the Scheduled Districts Act (XIV. of 1874), to be in force in the following deregulationized Scheduled Districts in the Chuttia Nagpur Division, namely, the Districts of Hazaribagh, Lohardaga, and Manbhum, and Pargana Dhalbhum, and the Kolhan in the District of Singbhum.—See Gazette of India, 1831, Pt. I. p. 504 (The District of Lohardaga included at this time the Palamau District which was separated in 1894.)

It has been extended, under s. 5 of the same Act, to the whole of Upper Burma except the Shan States.—See Burma Gazette, 1893, Pt. I., p. 154.

t. Act X. of 1865.

2. Chapters II. to XIII., both inclusive, of this Act shall apply, in the case of every Hindu, Muhammadan, Buddhist, and persons exempted under section 332 of the Indian Succession Act, 1865,\*\* dying before, on, or after the said first day of April 1881:

Provided that nothing herein contained shall be deemed to render invalid any transfer of property duly made before that day:

Provided also that, except in cases to which the Hindu Wills Act, 1870,† applies,

no Court in any local area beyond the limits of the towns of Calcutta, Madras, and Bombay, and the territories for the time being administered by the Chief Commissioner of British Burma,‡

and no High Court, in exercise of the concurrent jurisdiction over such local area hereby conferred,

shall receive applications for probate or letters of administration until the Local Government has, with the previous sanction of the Governor-General in Council, by a notification in the official Gazette, authorize it so to do. §

<sup>\*</sup> Act X. of 1865.

<sup>†</sup> The Hindu Wills Act (XXI. of 1870) applies, in the cases of Hindus, Jainas, Shikhs, and Budhists, in the territories subject to the Lieutenant-Governor of Bengal, and in the towns of Madras and Bombay.

<sup>‡</sup> Read now Lower Burma (see the Upper Burma Laws Act XX. of 1886 s. 4). The Chief Commissioner is now Lieutenant-Governor of Burma.—See Proclamation dated 11th April, 1897, Gasette of India, 1897, Pt. I., p. 261.

<sup>§</sup> The following Courts have been authorized to receive applications for probate or letters of administration within the areas mentioned namely:

in Bengal—the High Court at Calcutta, throughout the territories subject to the Lieutenant Governor of Bengal; all District Judges, as defined in the Act. within the said territories; and such Judicial Officers as the High Court may from time to time, appoint as District Delegates (see Calcutta Gazette, 1881, Pt L. p. 445);

in the Andaman and Nicobar Islands—the Court of the Deputy
Superintendent and the Court of the Chief Commissioner
(see Gasette of India 1881, Pt. I., p. 214);

in Assam—the High Court at Calcutta, throughout Assam; all District Judges, as defined in the Act, within the Province; and such Judicial Officers as the High Court may from time to time, appoint as District Delegates (see Assam Manual of Local Rules and Orders, Ed. 1893, p. 180);

8.\* In this Act, unless there be something repugnant in the subject or context—

"province" includes any division of British India having a Court of the last resort:

"minor" means any person subject to the Indian Majority Act, 1875,† who has not attained his majority within the meaning

in the Punjab—the Chief Court, throughout the territories administered by the Lieutenant-Governor of the Punjab; all District Judges, as defined in the Act. within the said territories; and such Judicial Officers as the Chief Court may, from time to time, appoint as District Delegates (see Punjab Gazette, 1881, Pt. I., p. 483);

in Madras—the High Court at Madras, throughout the territories subject to the Governor in Council; all District Judges, as defined in the Act, within the said territories; and such Judicial Officers as the High Court may, from time to time, appoint as Delegates (see Madras List of Local Rules and Orders, Ed. 1898, p. 161);

in the Central Provinces—the Judicial Commissioner, throughout the territories under the administration of the Chief Commissioner, and all Deputy Commissioners within those territories (see Central Provinces List of Local Rules and Orders, Ed. 1896, p. 97);

in Coorg—the Court of the Judicial Commissioner and the Court of the Commissioner (see Coorg District Gazette, 1889, Pt. I., p. 50);

in Bombay—the High Court at Bombay, throughout the territories subject to the Governor in Council; all District Judges, as defined in the Act, within the said territories; and such Judicial Officers as the High Court may, from time to time, appoint as District Delegates (see Bombay List of Local Rules and Orders, Ed. 1896, Vol. I., p. 252);

in Ajmere-Merwara—the Court of the Chief Commissioner and the Court of the Commissioner (see Gazette of India, 1889, Pt.

II, p. 52);
in the N-W Provinces and Oudh—the High Court at Allahabad, throughout the territories subject to the Lieutenant-Governor; the Judicial Commissioner of Oudh, throughout the territories subject to the Chief Commissioner; all District Judges, as defined in the Act, within the N.-W. Provinces and Oudh; and such Judicial Officers as the High Court or the Judicial Commissioner may, from time to time, appoint as District Delegates (see N-W. Provinces and Oudh List of Local Rules and Orders, Ed 1804, Pt. II., p. 48);

in Upper Burma: the Court of the Judicial Commissioner and all District Courts (see Burma Gazette, 1897, Pt. I., p. 289).

Compare Act X. of 1865, s. 3.

† Act IX. of 1875.

of that Act, and any other person who has not completed his age of eighteen years; and "minority" means the status of any such person:

"will" means the legal declaration of the intentions of the testator with respect to his property which he desires to be carried into effect after his death:

"codicil" means an instrument made in relation to a will, and explaining, altering, or adding to its dispositions. It is considered as forming an additional part of the will:

"specific legacy" means a legacy of specified property:

"demonstrative legacy" means a legacy directed to be paid out of specified property:

"probate" means the copy of a will certified under the seal of a Court of competent jurisdiction, with a grant of administration to the estate of the testator:

"executor" means a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided:

"administrator" means a person appointed by competent authority to administer the estate of a deceased person when there is no executor; and

"District Judge" means the Judge of a principal Civil Court of original jurisdiction.

# CHAPTER II.

OF GRANT OF PROBATE AND LETTERS OF ADMINISTRATION.\*

Character and property of executor or administrator as such.

4. The executor or administrator, as the case may be of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

But nothing herein contained shall vest in an executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other person.

<sup>\*</sup> Compare Act X. of 1865, Pt. XXIX. As to grants of letters of administration and probates to the Administrator-General, see the Administrator General's Act (II. of 1874).

5. When a will has been proved and deposited in a Court of competent jurisdiction, situated beyond Administration with copy the limits of the province, whether in the annexed of authenticated copy of will proved abroad. British dominions or in a foreign country, and a properly-authenticated copy of the will is produced, letters of administration may be granted with a copy of such copy annexed.

Probate only to appointed executor.

6. Probate can be granted only to an executor appointed by the will.

Appointment, express or implied.

7. The appointment may be express, or by necessary implication.

### Illustrations.

- (a.) A wills that C be his executor if B will not. B is appointed executor by implication.
- (b.) A gives a legacy to B and several legacies to other persons, among the rest to his daughter-in-law, C, and adds, "but, should the within-named C be not living, I do constitute and appoint B my whole and sole executrix." C is appointed executrix by implication.
- (c.) A appoints several persons executors of his will and codicils, and his nephew residuary legatee, and in another codicil are these words: "I appoint my nephew my residuary legatee to discharge all lawful demands against my will and codicils, signed of different dates" The nephew is appointed an executor by implication.

Persons to whom probate cannot be granted.

8. Probate cannot be granted to any person who is a minor, or is of unsound mind.

Grant of probate to several executors simultaneously or at different times.

9. When several executors are appointed, probate may be granted to them all simultaneously or at different times.

### Illustration.

A is an executor of B's will by express appointment, and C an executor of it by implication. Probate may be granted to A and C at the same time, or to A first, and then to C, or to C first, then to A.

Separate probate of codicil discovered after grant of probate.

10. If a codicil be discovered after the grant of probate, a separate probate of that codicil may be granted to the executor, if it in no way repeals the appointment of executors made by the will.

Procedure when different executors appointed by codi-

If different executors are appointed by the codicil, the probate of the will must be revoked, and a new probate granted of the will and the codicil together.

- Accrual of representation to surviving executor.
- 11. When probate has been granted to several executors, and one of them dies, the entire representation of the testator accrues to the surviving executor or executors.
  - Effect of probate.

12. Probate of a will, when granted, establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such.

To whom administration may not be granted.

- 13. Letters of administration cannot be granted to any person who is a minor, or is of unsound mind.
- 14. Letters of administration entitle the administrator to all rights belonging to the intestate as effec-Effect of letters of administually as if the administration had been tration. granted at the moment after his death.
- 15. Letters of administration do not render valid any intermediate acts of the administrator tending Acts not validated by adto the diminution or damage of the inministration. testate's estate.
- Grant of administration where executor has not renounced.

16. When a person appointed an executor has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued, calling upon the executor to accept or renounce his executorship;

except that, when one or more of several executors has or have proved a will, the Court may, on Exception. the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved.

17. The renunciation may be made orally in the presence of Form and effect of re- the Judge, or by a writing signed by the nunciation of executership. person renouncing, and, when made, shall preclude him from ever thereafter applying for probate of the will appointing him executor.

Procedure where executor renounce or fail to accept the executor-ship within the time limited for the accept within time limited.

with a copy of the will annexed may be granted to the person who would be entitled to administration in case of intestacy.

Grant of administration to universal or residuary legatee. 19. When the deceased has made a will, but has not appointed an executor, or

when he has appointed an executor, who is legally incapable or refuses to act, or has died before the testator, or before he has proved the will, or

when the executor dies after having proved the will, but before he has administered all the estate of the deceased,

- a universal or a residuary legatee may be admitted to prove the will, and letters of administration, with the will annexed, may be granted to him of the whole estate, or of so much thereof as may be unadministered.
- Right to administration of representative of deceased residuary legatee.

  Right to administration of representative of deceased residuary legatee.

  Survives the testator, but dies before the estate has been fully administered, his representative has the same right to administration, with the will annexed, as such residuary legatee.
- Grant of administration where no executor, nor residuary legatee, nor representative of such legatee. The declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly.
- 22. Letters of administration, with the will annexed, shall Citation before grant of administration to legatee other than universal or residuary.

  In our be granted to any legatee, other than an universal or a residuary legatee, until a citation has been issued and published in the manner hereinafter mentioned, calling on the next-of-kin to accept or refuse letters of administration.

To whom administration his estate may be granted to any person who, according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.

When several such persons apply for administration, it shall be in the discretion of the Court to grant it to any one or more of them.

When no such person applies, it may be granted to a creditor of the deceased.

## CHAPTER III.

## OF LIMITED GRANTS.\*

(a.)—Grants limited in Duration.

- 24. When the will has been lost or mislaid since the testator's Probate of copy or draft of death, or has been destroyed by wrong lost will.

  or accident, and not by any act of the testator, and a copy or the draft of the will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it be produced.
- 25. When the will has been lost or destroyed, and no Probate of contents of lost copy has been made, nor the draft preserved, probate may be granted of its contents, if they can be established by evidence.
- Probate of copy where original exists.

  Out of the province in which application for probate is made, who has refused or neglected to deliver it up, but a copy has been transmitted to the executor, and it is necessary for the interests of the estate that probate should be granted without waiting for the arrival of the original, probate may be granted of the copy so transmitted, limited until the will or an authenticated copy of it be produced.
- 27. Where no will of the deceased is forthcoming but there Administration until will is reason to believe that there is a will produced. in existence, letters of administration

<sup>\*</sup> Compare Act X. of 1865, Pt. XXX. (a) to (f).

may be granted, limited until the will or an authenticated copy of it be produced.

# (b.) - Grants for the Use and Benefit of others having Right.

Administration with will application is made, and there is no annexed to attorney of absent executor.

will annexed, may be granted to the agent of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself.

Administration with will annexed to atterney of absent person, who, if present, letters of administration with will annexed to atterney of absent person, who, if present, would be entitled to administration, with the will annexed, may be granted to his agent, limited as above mentioned.

Administration to attorney of absent person entitled to administration in case of absent person entitled to administer in case of intestacy is absent from the province, and no person equally entitled is willing to act, letters of administration may be granted as before mentioned.

- Administration during minority of sole executor or sole residuary legatee,

  Administration during letters of administration, with the will annexed, may be granted to the legal guardian of such minor, or to such other person as the Court shall think fit, until the minor has attained his majority, at which period, and not before, probate of the will shall be granted to him.
- Administration during executors who has attained majority, or two or more residuary legatees, and no residuary legatees, and no majority, the grant shall be limited until one of them has attained his majority.
- 88. If a sole executor or a sole universal or residuary legatee,
  Administration for use and benent of lunatic.

  or a person who would be solely entitled to the estate of the intestate according to

the rule\* for the distribution of intestates' estate applicable in the case of the deceased, be a minor or lunatic, letters of administration, with or without the will annexed, as the case may be, shall be granted to the person to whom the care of his estate has been committed by competent authority, or, if there be no such person, to such other person as the Court thinks fit to appoint, for the use and benefit of the minor or lunatic, until he attains majority, or becomes of sound mind, as the case may be.

Administration pendente deceased person, or for obtaining or revoking any probate or any grant of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate; and every such administrator shall be subject to the immediate control of the Court, and shall act under its direction.

# (c.)—For Special Purposes.

- 85. If an executor Probate limited to purpose specified in will. be appoint an agent to take administration, with the will annexed, shall accordingly be limited.
- Administration with will annexed limited to particular purpose.

  Administration with will attorney to prove a will on his behalf, and the authority is limited to a particular purpose, the letters of administration, with the will annexed, shall be limited accordingly.
- Administration limited to the sole or surviving trustee, or in which he had no beneficial interest on his own account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the beneficiary, or to some other person on his behalf.
- 38. When it is necessary that the representative of a person Administration limited to deceased be made a party to a pending suit.

  suit, and the executor or person entitled

<sup>\*</sup> Sic. Read "rules."

to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the said suit, and until a final decree shall be made therein and carried into complete execution.

39. If, at the expiration of twelve months from the date of Administration limited to any probate or letters of administration, purpose of becoming party the executor or administrator, to whom to suit to be brought against the same has or have been granted, is executor or administrator. absent from the province within which the Court that has granted the probate or letters of administration is situate, such Court may grant, to any person whom it thinks fit, letters of administration limited to the purpose of becoming and being made a party to a suit to be brought against the executor or administrator, and carrying the decree which may be made therein

40. In any case in which it appears necessary for preserving Administration limited to the property of a deceased person, the collection and preservation of Court, within whose district any of the deceased's property. property is situate, may grant, to any person whom such Court thinks fit, letters of administration limited to the collection and preservation of the property of the deceased, and giving discharges for debts due to his estate, subject to the

Appointment, as administrator, of person other than one who, under ordinary circumstances, would be entitled to administration.

41. When a person has died intestate, or leaving a will of which there is no executor willing and competent to act, or where the executor is, at he time of the death of such person resident out of the province, and it appears to the Court to be necessary or

convenient to appoint some person to administer the estate or any part thereof other than the person who, under ordinary circumstances, would be entitled to a grant of administration, the Judge may, in his discretion, having regard to consanguinity, amount of interest, the safety of the estate, and probability that it will be properly administered, appoint such person as he thinks fit to be ad-

and, in every such case, letters of administration may be limited or not, as the Judge thinks fit.

# (d.) - Grants with Exception.

Probate or administration, with will annexed, subject to exception.

Probate or administration, with will annexed, subject to fadministration with the will annexed, shall be granted, subject to such exception.

48. Whenever the nature of the case requires that an exception be made, letters of administration shall be granted, subject to such exception.

# (e.)—Grants of the Rest.

Probate or administration administration, with or without the will annexed, has been made, the person entitled to probate or administration of the remainder of the deceased's estate may take a grant of probate or letters of administration, as the case may be, of the rest of the deceased's estate.

# (f.)—Grants of Effects unadministered.

Grant of effects unadmainistered.

Grant of effects unadmay be appointed for the purpose of administering such part of the estate.

46. In granting letters of administration of an estate not fully Rules as to grants of effects administered, the Court shall be guided by the same rules as apply to original grants, and shall grant letters of administration to those persons only to whom original grants might have been made.

47. When a limited grant has expired by effluxion of time, or the happening of the event or contingency on which it was limited, and there is still some part of estate unadministered.

granted to those persons to whom original grants might have been made.

# CHAPTER IV.

# ALTERATION AND REVOCATION OF GRANTS.\*

48. Errors in names and descriptions or in setting forth the What errors may be rectitime and place of the deceased's death, fied by Court. or the purpose in a limited grant, may be rectified by the Court, and the grant of probate or letters of administration may be altered and amended accordingly.

49. If, after the grant of letters of administration with the will annexed, a codicil be discovered, it may be Procedure where codicil discovered after grant of ad-

ministration with will annexed.

Revocation or annulment

added to the grant on due proof and identification, and the grant altered and amended accordingly.

50. The grant of probate or letters of administration may be revoked or annulled for just cause.

" Just cause."

for just cause.

Explanation.—" Just cause" is—

181, that the proceedings to obtain the grant were defective in substance;

2nd, that the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to

3rd, that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently;

4th, that the grant has become useless and inoperative through circumstances :

†5th, that the person to whom the grant was made has, wilfully and without reasonable cause, omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII. of this Act, or has exhibited under that chapter an inventory or account which is untrue in a material respect.

## Illustrations.

(a.) The Court by which the grant was made had no jurisdiction.

<sup>\*</sup> Compare Act X. of 1865, Pt. XXX. (g) and (h). † Cl. 5th has been added by the Probate and Administration Act (VI. of 1889), s. 11.

- (b.) The grant was made without citing parties who ought to have been cited.
  - (c.) The will of which probate was obtained was forged or revoked.
- (d.) A obtained letters of administration to the estate of B as his widow, but it has since transpired that she was never married to him.
- (e.) A has taken administration to the estate of B as if he had died intestate, but a will has since been discovered.
  - (f.) Since probate was granted, a later will has been discovered.
- (g.) Since probate was granted, a codicil has been discovered, which revokes or adds to the appointment of executors under the will.
- (h.) The person to whom probate was, or letters of administration were, granted has subsequently become of unsound mind.

## CHAPTER V.

OF THE PRACTICE IN GRANTING AND REVOKING PROBATES AND LETTERS OF ADMINISTRATION.\*\*

- 51. The District Judge shall have jurisdiction in granting

  Jurisdiction of District

  Judge in granting and revoking probates and letters of administration in all cases within his district.
- 52. The High Court may, from time to time, appoint such Power to appoint Delegate of District Judge to deal with thinks fit to act for the District Judge as Delegates to grant probate and letters of administration in non-contentious cases within such local limits as it may, from time to time, prescribe:

Provided that, in the case of High Courts not established by Royal Charter, such appointment be made with the previous sanction of the local Government.

Persons so appointed shall be called "District Delegates."

53. The District Judge shall have the like powers and authority District Judge's powers as in relation to the granting of probate and to grant of probate and administration, and all matters connected therewith, as are by law vested in him in relation to any civil suit or proceeding depending in his Court.

<sup>\*</sup>Compare Act X. of 1865, Pt. XXXI., as amended by Acts XXIII. of 1875 and VI. of 1881.

54. The District Judge may order any person to produce

District Judge may order and bring into Court any paper or writing being or purporting to be testamentary papers.

possession or under the control of such person;

and, if it be not shown that any such paper or writing is in the possession or under the control of such person, but there is reason to believe that he has the knowledge of any such paper or writing, the Court may direct him to attend for the purpose of being examined respecting the same;

and he shall be bound to answer such questions as may be put to him by the Court, and if so ordered, to produce and bring in such paper or writing, and shall be subject to the like punishment under the Indian Penal Code,\* in case of default in not attending, or in not answering such questions or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit, and had made such default;

and the costs of the proceeding shall be in the discretion of the Judge.

55. The proceedings of the Court of the District Judge, in Proceedings of District relation to the granting of probate and Judge's Court in relation to the granting of probate and letters of administration, shall, except as probate and administration. Hereinafter otherwise provided, be regulated, so far as the circumstances of the case will admit, by the Code of Civil Procedure.†

56. Probate of the will or letters of administration to the when probate or administration may be granted by granted by the District Judge under the seal of his Court, if it appears by a petition, verified as hereinafter mentioned, of the person applying for the same, that the testator or intestate, as the case may be, had, at the time of his decease, a fixed place of abode, or any property, moveable or immoveable, within the jurisdiction of the Judge.

Disposal of apolication is made to the Judge of a district in which the deceased had no fixed abode at the time of his death, the Judge may in his discretion, refuse the application, if, in his judgment, it could be

<sup>\*</sup> See Act XLV. of 1860.

<sup>†</sup> See now Act XIV. of 1882, s. 3.

disposed of more justly or conveniently in another district, or where the application is for letters of administration, grant them absolutely, or limited to the property within his own jurisdiction.

- Probate and letters of administration may, upon appliprobate and letters of administration may be granted by him in any case in which there is no contention, if it appears by petition (verified as hereinafter mentioned) that the testator or intestate, as the case may be, at the time of his death, had his fixed place of abode within the jurisdiction of such Delegate.
- **59.** Probate or letters of administration shall have effect Conclusiveness of probate over all the property, moveable or importence in which the same is or are\* granted, and shall be conclusive as to the representative title against all debtors of the deceased and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted:
- † "Provided that probates and letters of administration granted—
  - (a) by a High Court, or
  - (b) by a District Judge, where the deceased at the time of his death had his fixed place of abode situate within the jurisdiction of such Judge, and such Judge certifies that the value of the property affected beyond the limits of the province does not exceed ten thousand rupees,

shall, unless otherwise directed by the grant, have like effect throughout the whole of British India."

60.‡ (1) Where probate or letters of administration has or Transmission to High have been granted by a Court with the Courts of certificates of grants under proviso to section 59. the High Court or District Judge shall send a certificate thereof to the following Courts, namely:—

<sup>\*</sup> The words "or are" have been inserted by the Repealing and Amending Act (XII. of 1891).

<sup>†</sup> This proviso has been substituted for the original by Act VIII. of

<sup>‡</sup> S. do has been re-enacted by Act VIII. of 1903.

- (a) when the grant has been made by a High Court, to each of the other High Courts,
- (b) when the grant has been made by a District Judge, to the High Court to which such District Judge is subordinate, and to each of the other High Courts.
- (2) Every certificate referred to in sub-section (1) shall be to the following effect, namely:—
- of Judicature at [or as the case may be] of the High Court of Judicature at [or as the case may be], hereby certify that on the day of the High Court of Judicature at [or as the case may be] granted probate of the will [or letters] has [or have] effect over all the property of the deceased throughout the whole of British India;

and such certificate shall be filed by the High Court receiving the same.

- (3) Where any portion of the assets has been stated by the petitioner, as hereinafter provided in sections 62 and 64, to be situate within the jurisdiction of a District Judge in another Province, the Court required to send the certificate referred to in sub-section (1) shall send a copy thereof to such District Judge, and such copy shall be filed by the District Judge receiving the same.
- Conclusiveness of soplication for probate or letters of administration, if made and verified in the manner hereinafter mentioned, shall be conclusiveness, it properly made and verified.

  Sive for the purpose of authorizing the grant of probate or administration; and no such grant shall be impeached by reason that the testator or intestate had no fixed place of abode, or no property within the district at the time of his death, unless by a proceeding to revoke the grant if obtained by a fraud upon the Court.
- 62. Application for probate or for letters of administration with the will annexed, shall be made by a petition distinctly written in English, or in the language in ordinary use in proceedings before the Court in which the application is made, with the will, or in the cases mentioned in sections 24, 25, and 26, a copy, draft, or statement of the contents thereof annexed, and stating—

the time of the testator's death;

that the writing annexed is his last will and testament, or as the case may be;

that it was duly executed;

the amount of assets which are likely to come to the petitioner's hands;

and, where the application is for probate, that the petitioner is the executor named in the will.

In addition to these particulars, the petition shall further state,—

when the application is to the District Judge, that the deceased, at the time of his death, had a fixed place of abode, or had some property situate within the jurisdiction of the Judge; and,

when the application is to a District Delegate, that the deceased, at the time of his death, had a fixed place of abode within the jurisdiction of such Delegate.

"When the application is to the District Judge, and any portion of the assets likely to come to the petitioner's hands is situate in another Province, the petition shall further state the amount of such assets in each Province and the District Judges within whose jurisdiction such assets are situate."\*

In what cases where in the will, copy, or draft is written in any language other than English, or of will to be annexed to than that in ordinary use in proceedings before the Court, there shall be a translation thereof annexed to the petition by a translator of the Court, if the language be one for which a translator is appointed; Verification of translation or, if the will, copy, or draft be in

by person other than Court any other language, then by any person competent to translate the same: in which case such translation shall be verified by that person in the following manner:—

"I, A B, do declare that I read and perfectly understand the language and character of the original, and that the above is a true and accurate translation thereof."

<sup>\*</sup> This para, has been added by Act VIII. of 1903.

64. Application for letters of administration shall be made Petition for letters of adby petition distinctly written as afore-said, stating—

the time and place of the deceased's death,

the family or other relatives of the deceased, and their respective residences,

the right in which the petitioner claims,

the amount of assets which are likely to come to the petitioner's hands.

In addition to these particulars, the petition shall further, state,—

when the application is to a District Judge, that the deceased at the time of his death, had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and,

when the application is to a District Delegate, that the deceased, at the time of his death, had a fixed place of abode within the jurisdiction of such Delegate.

"When the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another Province, the petition shall further state the amount of such assets in each Province, and the District Judges within whose jurisdiction such assets are situate."\*

Additional statements in in the proviso to section 59 for probate petition for probate, &c. of a will or letters of administration of an estate, intended to have effect throughout British India, shall state in his petition, in addition to the matters respectively required by sections 62 and 64, that, to the best of his belief, no application has been made to any other Court for a probate of the same will or for letters of administration of the same estate, intended to have such effect as last aforesaid.

or where any such application has been made, the Court to which it was made, the person or persons by whom it was made, and the proceedings (if any) had thereon.

And the Court to which any application is made under the proviso to section 59 may, if it think fit, reject the same.

<sup>\*</sup> This para. has been added by Act VIII. of 1903.

- Petition for probate or administration shall.

  Petition for probate or administration shall.

  in all cases, be subscribed by the petitioner and his pleader, if any, and shall be verified by the petitioner in the following manner, or to the like effect:—
- "I, A B, the petitioner in the above petition, declare that what is stated therein is true to the best of my information and belief."
- **67.** Where the application is for probate, or for letters of Verification of petition for administration, with the will annexed, the probate by one witness to petition shall also be verified by at least one of the witnesses to the will (when procurable) in the manner, or to the effect, following:
- "I, C D, one of the witnesses to the last will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (or mark) thereto (as the case may be) (or that the said testator acknowledged the writing annexed to the above petition to be his last will and testament in my presence)."
- Punishment for false averment to be verified contains any averment which the person making the verification knows or believes to be false, such person shall be subject to punishment according to the provisions of the law\* for the time being in force for the punishment of giving or fabricating false evidence.

District Judge may examine petitioner in person, for the District Judge or District Delegate, if he thinks fit,

to examine the petitioner in person upon oath, and also
to require further evidence of the due execution of the will or the
require further evidence,
require further evidence,
ministration, as the case may be, and

and issue citations to inany interest in the estate of the deceased
spect proceedings to come and see the proceedings before the grant of probate or letters of administration.

<sup>\*</sup> See the Indian Penal Code (Act XLV. of 1860), Ch. XI.

The citation shall be fixed up in some conspicuous part of the Publication of citation.

Court-house, and also in the office of the Collector of the district, and otherwise published or made known in such manner as the Judge or Delegate issuing the same may direct.

"Where any portion of the assets has been stated by the petitioner to be situate within the jurisdiction of a District Judge in another Province, the District Judge issuing the same shall cause a copy of the citation to be sent to such other District Judge, who shall publish the same in the same manner as if it were a citation issued by himself, and shall certify such publication to the District Judge who issued the citation."\*

Caveats against the grant of probate or letters of administration.

Caveats against grant of probate or administration.

Indge or a District Delegate; and, immediately on any caveat being lodged with any District Delegate, he shall send a copy thereof to the District Judge; and, immediately on a caveat being entered with the District Judge, a copy thereof shall be given to the District Delegate, if any, within whose jurisdiction it is alleged the deceased had his fixed place of abode at the time of his death, and to any other Judge or District Delegate to whom it may appear to the District Judge expedient to transmit the same.

Form of caveat. 71. The caveat shall be to the following effect:—

"Let nothing be done in the matter of the estate of AB, late of , deceased, who died on the day of , at , without notice to CD, of ."

72. No proceeding shall be taken on a petition for probate

After entry of caveat no proceeding taken on cettion against the grant thereof has been enteruntil after notice to caveator. ed with the Judge or District Delegate to whom the application has been made, or notice thereof has been given of its entry with some other Delegate, until after such notice to the person by whom the same has been entered, as the Court shall think reasonable.

73. A District Delegate shall not grant probate or letters of District Delegate when not to grant probate or administration in any case in which there is contention as to the grant, or in which it otherwise appears to him that probate or letters of administration ought not to be granted in his Court.

<sup>\*</sup> This para, has been added by act VIII. of 1903.

Explanation.—By "contention" is understood the appearance of any one in person, or by his recognised agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding.

74. In every case in which there is no contention, but it appears to the District Delegate doubtful Power to transmit statewhether the probate or letters of adminisment to District Judge in tration should or should not be granted, doubtful cases where no conor when any question arises in relation to the grant, or application for the grant, of any probate or letters of administration, the District Delegate may, if he thinks proper, transmit a statement of the matter in question to the District Judge, who may direct the District Delegate to proceed in the matter of the application, according to such instructions as to the Judge may seem necessary, or may forbid any further proceeding by the District Delegate in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Judge.

Procedure where there is contention or the District Delegate is of opinion that the probate or letters of administration should be refused in his Court. The petition, with any documents that may have been filed therewith, shall be returned to the person was made, in order that the same may be presented to the District Ludges are less than the probate of the District Ludges are less than the probate of the District Ludges are less than the probate of the District Ludges are less than the probate of the District Ludges are less than the probate of the District Ludges are less than the probate of the District Ludges are less than the probate of the District Ludges are less than the probate of the District Ludges are less than the probate of the prob

presented to the District Judge; unless the District Delegate thinks it necessary, for the purposes of Justice, to impound the same, which he is hereby authorized to do; and in that case the same shall be sent by him to the District Judge.

Grant of probate to be that probate of a will should be granted, under seal of Court.

The description of the probate of a will should be granted, he shall grant the same under the seal

of his Court in manner following:

"I, , Judge of the district of

Form of such grant.

Form of such grant.

Form of such grant.

Insert the limits of the Delegate's jurisdiction) hereby make known that, on the day of , in the year

the last will of late of ,

a copy whereof is hereunto annexed, was proved and registered before me, and that administration of the property and credits of the said deceased, and in any way concerning his will, was granted to the executor in the said will named, he having undertaking to administer the same, and to make a full and true inventory of the said property and credits, and exhibit the same in this Court within six months from the date of this grant, or within such further time as the Court may, from time to time, appoint; and credits within one year from the same date, or within such further time as the Court may, from time to time, appoint.\*\*

"The day of 18 ."

Grant of letters of administration to tration to be under seal of Court.

Should be granted, he shall grant the same under the seal of his Court in manner following:—

Delegate that letters of administration to the estate of a person deceased, with or without a copy of the will annexed, should be granted, he shall grant the same under the seal of his Court in manner following:—

" I. , Judge of the district of Delegate appointed for granting probate. Form of such grant. or letters of administration in (here insert the limits of the Delegate's jurisdiction)], hereby make known , letters of adminisday of tration (with or without the will annexed, as the case may be) of the property and credits of , late of deceased, were granted to , the father (or as the case may be) of the deceased, he having undertaken to administer the same, and to make a full and true inventory of the said property and credits, and exhibit the same in this Court within six months from the date of this grant, or within such further time as the Court may from time to time, appoint; and also to render to this Court a true

<sup>\*</sup> The italicized words ending s. 76 have been substituted for the words, "he having undertaken to administer the same and to make a true inventory of the said property and credits, and to exhibit the same at or before the expiration of six months from the date of this grant, and also to render a true account of the said property and credits within one year from the same date," by the Probate and Administration Act (VI. of 1886), s. 12.

account of the said property and credits within one year from the same date, or within such further time as the Court may, from time to time, appoint.\*

The day of 18

- Administration-bond.

  Administration-bond.

  Administration-bond.

  Administration-bond.

  The probability of the direct, any person to whom probate is granted, shall give a bond to the Judge of the District Court, to enure for the benefit of the Judge for the time being, with one or more surety or sureties, engaging for the due collection, getting in, and administering the estate of the deceased, which bond shall be in such form as the Judge, from time to time, by any general or special order, directs.
- 79. The Court may, on application made by petition, and on Assignment of administrabeing satisfied that the engagement of any such bond has not been kept, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as the Court may think fit, assign the same to some proper person, who shall thereupon be entitled to sue on the said bond in his own name as if the same had been originally given to him instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustee for all persons interested, the full amount recoverable in respect of any breach thereof.
- Time before which probate or administration shall not be granted.

  Time before which probate or administration shall not be granted.

  piration of seven clear days, and no letters of administration shall be granted until after the expiration of fourteen clear days, from the day of the testator or intestate's death.
- Filing of original wills of which probate or administration, with will annexed, granted.

  State of wills is established, every District Delegate shall file and preserve among the records of his Court, all original wills of which probate or letters of administration, with the will annexed, may be granted by him; and the Local Government.

<sup>\*</sup> The italicized words ending s. 77 have been substituted for the words "he having undertaken to administer the same and to make a true inventory of the said property and credits, and to exhibit the same in this Court at or before the expiration of six months from the date of this grant, and also to render a true account of the said property and credits within one year from the same date," by the Probate and Administration Act (VI. of 1889), s. 13.

shall make regulations for the preservation and inspection of the will so filed as aforesaid.\*

- 82. After any grant of probate or letters of administration, no other than the person to whom the same ministration alone to sue, &c., and the person to whom the same shall have been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, throughout the province in which the same may have been granted, until such probate or letters of administration shall have been recalled or revoked.
- 83. In any case before the District Judge in which there is Procedure in contentious contention, the proceedings† shall take, as nearly as may be, the form of a suit, according to the provisions of the Code of Civil Procedure,‡ in which the petitioner for a probate or letters of administration, as the case may be, shall be the plaintiff, and the person who may have appeared as aforesaid to oppose the grant shall be the defendant.
- Payment to executor or administrator before probate or administrator before probate or administrator revoked.

  cation thereof shall, notwithstanding such revocation, be a legal discharge to the person making the same;

and the executor or administrator, who shall have acted under Right of such executor or any such revoked probate or administration, may retain and reimburse himself out of the assets of the deceased in respect of any payments made by him which the person to whom probate or letters of administration shall be afterwards granted might have lawfully made.

85. Notwithstanding anything hereinbefore contained, it shall,

Power to refuse letters of except in cases to which the Hindu Wills

Act, 1870, applies, § be in the discretion

<sup>\*</sup> For rules made by the Chief Commissioner (now Lieutenant-Governor) of Burma, see Burma Rules Manual, Ed. 1897, p. 18.

<sup>†</sup> The word "proceedings" has been substituted for the word "proceeding" by the Repealing and Amending Act (XII. of 1891).

<sup>#</sup> See now Act V. of 1908.

<sup>§</sup> The Hindu Wills Act (XXI, of 1870) applies to the Wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and in the Towns of Madras and Bombay.

of the Court to make an order refusing, for reasons to be recorded by it in writing, to grant any application for letters of administration made under this Act.

- Appeals from orders of District Judge. by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court under the rules contained in the Code of Civil Procedure\* applicable to appeals.
- 87. The High Court shall have concurrent jurisdiction with Concurrent jurisdiction of the District Judge in the exercise of all the powers hereby conferred upon the District Judge.

## CHAPTER VI.

OF THE POWERS OF AN EXECUTOR OR ADMINISTRATOR. †

88. An executor or administrator has the same power to sue In respect of causes of action that in surviving deceased, and debts due at death.

due to him at the time of his death, as the deceased had when living.

Demands and rights of suit of or against deceased survive to and against executor or administrators,

except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party, and except also cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory.

### Illustration.

A collision takes place on a railway in consequence of some neglect or default of the officials, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having instituted any suit. The cause of action does not survive.

<sup>\*</sup> See now Act V. of 1908. † Compare Act X. of 1865, Pt. XXXIII.

- 90.\* (1) An executor or administrator has, subject to the Power of executor or administrator to dispose of property.

  Power of executor or administrator has, subject to the provisions of this section, power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under section 4.
- (2) The power of an executor to dispose of immoveable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him, and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order.
- (3) An administrator may not, without the previous permission of the Court by which the letters of administration were granted,—
  - (a) mortgage, charge, or transfer by sale, gift, exchange, or otherwise any immoveable property for the time being vested in him under section 4, or

(b) lease any such property for a term exceeding five years.

(4) A disposal of property by an executor or administrator in contravention of sub-section (2) or sub-section (3), as the case may be, is voidable at the instance of any other person interested in the property.

(5) Before any probate or letters of administration is or are granted under this Act, there shall be endorsed thereon, or annexed thereto, a copy of sub-sections (1), (2), and (4), or of sub-sections

(1), (3), and (4), as the case may be.

(6) A probate or letters of administration shall not be rendered invalid by reason of the endorsement or annexture required by the last foregoing sub-section not having been made thereon or attached thereto, nor shall the absence of such an endorsement or annexture authorize an executor or administrator to act otherwise than in accordance with the provisions of this section.

Purchase by executor or administrator purchases, either directly or indirectly, any part of the property of the deceased, the sale is voidable at the instance of any other person inter-

property. ested in the property sold.

<sup>\*</sup> This section was substituted for the original s. 90 by the Probate and Administration Act (VI. of 1889), s. 14. For validation of acts under grants of administration made before the commencement of Act VI. of 1889, see s. 19 of that Act.

92. When there are several executors or administrators, the powers of all may, in the absence of Powers of several exeany direction to the contrary in the cutors or administrators exerciseable by one. will or grant of letters of administration, be exercised by any one of them who has proved the will or taken out administration.

### Illustrations.

- (a.) One of several executors has power to release a debt due to the deceased.
  - (b.) One has power to surrender a lease.
- (c.) One has power to sell the property of the deceased moveable or immoveable.
  - (d.) One has power to assent to a legacy.
- (e.) One has power to indorse a promissory note payable to the deceased.
- (f.) The will appoints A, B, C, and D, to be executors, and directs that two of them shall be a quorum. No act can be done by a single executor.
- 93. Upon the death of one or more of several executors or administrators, all the powers of the Survival of powers on death of one of several exeoffice become, in the absence of any cutors or administrators. direction to the contrary in the will or grant of letters of administration, vested in the survivors or survivor.
- 84. The administrator of effects unadministered has, with respect to such effects, the same powers Powers of administrator of as the original executor or administrator. effects unadministered.

Powers of administrator during minority.

Powers of married executrix or administratrix.

95. An administrator during minority has all the powers of an ordinary administrator.

96. When probate or letters of administration shall have been granted to a married woman, she has all the powers of an ordinary executor or administrator

# CHAPTER VII.

OF THE DUTIES OF AN EXECUTOR OR ADMINISTRATOR.\*

- As to deceased's funeral performance of the necessary funeral ceremonies. ceremonies of the deceased in a manner suitable to his condition if he he has left property sufficient for the purpose.
- 1 Inventory and account. If you have time as the Court which granted the probate or letters may, from the grant of probate or letters may, from time to time, appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character, and shall, in like manner, within one year from the grant, or within such further time as the said Court may, from time to time, appoint, exhibit an account of the estate, showing the assets which have come to his hands, and the manner in which they have been applied or disposed of.
- (2) The High Court may, from time to time, prescribe the form in which an inventory or account under this section is to be exhibited.
- (3) If an executor or administrator, on being required by the Court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition, he shall be deemed to have committed an offence under section 176 of the Indian Penal Code.
- (4) The exhibition of an intentionally false inventory or account under this section shall be deemed to be an offence under section 193 of that Code.

<sup>\*</sup> Compare Act X. of 1865, Pt. XXXIV., as amended by Act XIII. of

<sup>†</sup> This section has been substituted for the original s. 98 by the Probate and Administration Act (VI. of 1889), s. 15.

P. In all cases where a grant has been made\* of probate or laventory to include property in any part of British India.

India, the executor or administrator\* shall include in the inventory of the effects of the deceased all his moveable or immoveable property situate in British India;

and the value of such property situate in each province shall be separately stated in such inventory; and the probate or letters of administration shall be chargeable with a fee corresponding to the entire amount or value of the property affected thereby, wheresoever situate within British India.

- As to property of, and debts owing to, deceased.

  As to property of, and debts owing to, deceased.

  As to property of, and debts owing to, deceased and the debts that were due to him at the time of his death.
- Expenses to be paid before all debts.

  Expenses to be paid before all debts.

  Expenses to be paid before and death-bed charges, including fees for medical attendance, and board and lodging for one month previous to his death, are to be paid before all debts.
- 102. The expenses of obtaining probate or letters of administration, including the costs incurred for, or in respect of, any judicial proceedings that may be necessary for administering the estate, are to be paid next after the funeral expenses and death-bed charges.
- Wages due for services rendered to the deceased within Wages for certain services to be next paid, and then three months next preceding his death by any labourer, artisan, or domestic servant, are next to be paid, and then the other debts of the deceased, according to their respective priorities (if any).

Save as aforesaid, all debts to be paid equally and rate-ably.

104. Save as aforesaid, no creditor is to have a right of priority over another.

<sup>\*</sup> In s. 99, the italicised words "a grant has been made" have been substituted for the words. "it is sought to obtain a grant," by the Probate and Administration Act (VI. of 1889), s. 16, and the italicised word "Administration" has been substituted for the words "the person applying for administration," by the same Act and section.

But the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably, as far as the assets of the deceased will extend.

Debts to be paid before legacies.

105. Debts of every description must be paid before any legacy.

106. If the estate Executor or administrator not bound to pay legacies without indemnity.

of the deceased is subject to any contingent liabilities, an executor or administrator is not bound to pay any legacy without a sufficient indemnity to meet the liabilities whenever they may become due.

107. If the assets, after payment of debts, necessary expenses, and specific legacies, are not sufficient Abatement of general leto pay all the general legacies in full, gacies. the latter shall abate or be diminished in equal proportions;

Executor not to pay one legatee in preference to another.

and, in the absence of any direction to the contrary in the will, the executor has no right to pay one legatee in preference to another. nor to retain any money on account of a legacy to himself, or to any person for whom he is a trustee.

Non-abatement of specific legacy when assets sufficient to pay debts.

108. Where there is a specific legacy, and the assets are sufficient for the payment of debts and necessary expenses, the thing specified must be delivered to the legatee without any abatement.

Right under demonstrative legacy when assets sufficient to pay debts and necessary

expenses.

109. Where there is a demonstrative legacy, and the assets are sufficient for the payment of debts and necessary expenses, the legatee has a preferential claim for payment of his legacy out of the fund from which the

legacy is directed to be paid until such fund is exhausted, and if, after the fund is exhausted, part of the legacy still remains unpaid, he is entitled to rank for the remainder against the general assets as for a legacy of the amount of such unpaid remainder.

110. If the assets are not sufficient to answer the debts and of the specific legacies, an abatement shall Rateable abatement be made from the latter rateably in prospecific legacies. portion to their respective amounts.

#### Illustration.

A has bequeathed to B a diamond ring, valued at 500 rupees, and to C a horse, valued at 1,000 rupees. It is found necessary to sell all the effects of the testator, and his assets, after payment of debts, are only 1,000 rupees. Of this sum, Rupees 333-5-4 are to be paid to B, and Rupees 666-10-8 to C.

111. For the purpose of abatement, a legacy for life, a sum.

Legaciestreated as general appropriated by the will to produce an annuity, and the value of an annuity when no sum has been appropriated to produce it, shall be treated as general legacies.

## CHAPTER VIII.

## OF THE EXECUTOR'S ASSENT TO A LEGACY.\*

Assent necessary to complete legatee's title.

112. The assent of the executor is necessary to complete a legatee's title to his legacy.

### Illustrations.

- (a.) A, by his will, bequeaths to B his Government Paper, which is in deposit with the Bank of Bengal. The Bank has no authority to deliver the securities nor B a right to take possession of them, without the assent of the executor.
- (b) A, by his will has bequeathed to C his house in Calcutta in the tenancy of B. C is not entitled to receive the rents without the assent of the executor.
- Effect of executor's assent be sufficient to divest his interest as executor specific legacy. Significant to the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way.

This assent may be verbal, and it may be either express or implied from the conduct of the executor.

<sup>\*</sup> Compare Act X. of 1865, Pt. XXXV. The provisions in Ch. VIII. as to an executor apply also to an administrator with the will annexed.—See s. 140, infra.

### Illustrations.

- (a.) A horse is bequeathed. The executor requests the legatee to dispose of it, or a third party proposes to purchase the horse from the executor, and he directs him to apply to the legatee. Assent to the legacy is implied.
- (b.) The interest of a fund is directed by the will to be applied for the maintenance of the legatee during his minority. The executor commences so to apply it. This is an assent to the whole of the bequest.
- (c.) A bequest is made of a fund to A, and after him to B. The executor pays the interest of the fund to A. This is an implied assent to the bequest to B.
- (d.) Executors die after paying all the debts of the testator, but before satisfaction of specific legacies. Assent to the legacies may be presumed.
- (e.) A person to whom a specific article has been bequeathed takes possession of it, and retains it without any objection on the part of the executor. His assent may be presumed.
- 114. The assent of an executor to a legacy may be conditional assent.

  Conditional assent.

  Conditional assent.

  and if the condition be one which he has a right to enforce, and it is not performed, there is no assent.

### Illustrations.

- (a.) A bequeaths to B his lands of Sultanpur, which, at the date of the will, and at the death of A, were subject to a mortgage for 10,000 rupees. The executor assents to the bequest on condition that B shall, within a limited time, pay the amount due on the mortgage at the testator's death. The amount is not paid. There is no assent.
- (b.) The executor assents to a bequest on condition that the legatee shall pay him a sum of money. The payment is not made. The assent is nevertheless valid.
- Assent of executor to his legacy is necessary to complete his title own legacy.

  Legacy is necessary to complete his title to it in the same way as it is required when the bequest is to another person, and his assent may in like manner be express or implied.

Assent shall be implied if, in his manner of administering the property, he does any act which is referable to his character of legatee, and is not referable to his character of executor.

### Illustration.

An executor takes the rent of a house or the interest of Government securities bequeathed to him, and applies it to his own use. This is assent.

116. The assent of the executor to Effect of executor's assent. a legacy gives effect to it from the death of the testator.

#### Illustrations.

- (a.) A legatee sells his legacy before it is assented to by the executor. The executor's subsequent assent operates for the benefit of the purchaser, and completes his title to the legacy.
- (b.) A bequeaths 1,000 rupees to B, with interest from his death. The executor does not assent to this legacy until the expiration of a year from A's death. B is entitled to interest from the death of A.
- Executor when to deliver legacies. Is not bound to pay or deliver any legacy until the expiration of one year from the testator's death.

#### Illustration.

A by his will directs his legacies to be paid within six months after his death. The executor is not bound to pay them before the expiration of a year.

# CHAPTER IX.

# OF THE PAYMENT AND APPOINTMENT OF ANNUITIES.\*

- 118. Where an annuity is given by the will, and no time is

  Commencement of annuity fixed for its commencement, it shall commence from the testator's death, and the first payment shall be made at the expiration of a year next after that event.
- When annuity, to be paid quarterly or monthly, the first payment shall be due at the end of the first quarter or first month, as the case may be, after the testator's death, and shall, if the executor think fit, be paid when due; but the executor shall, not be bound to pay it till the end of the year.

<sup>\*</sup> Compare Act X. of 1865, Pt. XXXVI. The provisions in Ch. IX. as to an executor apply also to an administrator with the will anne zed.—See s. 148, infra.

Date of successive payments when first payment directed to be made within given time or on day certain.

120. Where there is a direction that the first payment of an annuity shall be made within one month or any other division of time from the death of the testator, or on a day certain, the successive payments are to be made on the anniversary of the earliest day on which the will authorizes the first payment to be made:

Apportionment where annuitant dies between times of payment.

and, if the annuitant dies in the interval between the times of payment, an apportioned share of the annuity shall be paid to his presentative.

#### CHAPTER X.

OF THE INVESTMENT OF FUNDS TO PROVIDE FOR LEGACIES.\*

121. Where a legacy, not being a specific legacy, is given for Investment of sum bequeat life, the sum bequeathed shall, at the end of the year, be invested in such sethed where legacy, not specific, given for life. curities as the High Court may, by any general rule to be made from time to time, authorize or direct, and the proceeds thereof shall be paid to the legatee as the same shall accrue due.

122. Where a general legacy is given to be paid at a future time, the executor shall invest a sum Investment of general legacy to be paid at future sufficient to meet it in securities of the time. kind mentioned in the last-preceding section.

Intermediate interest.

The intermediate interest shall form part of the residue of the testator's estate.

123. Where an annuity is given, and no fund is charged with its payment, or appropriated by the will Procedure when no fund to answer it, a Government annuity of charged with, or appropriated to, annuity. the specified amount shall be purchased,

<sup>\*</sup> Compare Act X. of 1865, Pt. XXXVII., as amended by Act VI. of 1881. The provisions in Ch. X. as to an executor apply also to an administrator with the will annexed.—See s. 148, infra.

if no such annuity can be obtained, then a sum sufficient to produce the annuity shall be invested for that purpose in such securities as the High Court may, by any general rule to be made from time to time, authorize or direct.

Transfer to residuary legates of contingent bequest. bound to invest the amount of the legacy, but may transfer the whole residue of the estate to the residuary legates (if any) on his giving sufficient security for the payment of the legacy, if it shall become due.

Investment of residue bequeathed for life, with direction to invest in specified securities.

Investment of residue bequeathed for life, with direction to invest in specified securities, so much of the estate as is not, at the time of his death, invested in securities of the specified kind, shall be converted into money, and invested in such securities.

Time and manner of conversion and investment as are contemplated by the last-preceding section shall be made at such times, and in such manner, as the executor, in his discretion, thinks fit;

and, until such conversion and investment shall be comInterest payable until inpleted, the person who would be for the
time being entitled to the income of the
fund when so invested shall receive interest at the rate of six per
cent. per annum upon the market-value (to be completed as of
the date of the testator's death) of such part of the fund as shall
not yet have been so invested.

127. Where, by the terms of a bequest, the legatee is entitled to the immediate payment or possession

Procedure where minor entitled to immediate payment or possession of bequest, and no direction to pay to person on his behalf. to the immediate payment or possession of the money or thing bequeathed, but is a minor, and there is no direction in the will to pay it to any person on his behalf, the executor or administrator

shall pay or deliver the same into the Court of the District Judge by whom, or by whose District Delegate, the probate was, or letters of administration, with the will annexed, were, granted, to the account of the legatee, unless the legatee be a ward of the Court of Wards; and, if the legatee be a ward of the Court of Wards, the legacy shall be paid into that Court to his account; and such payment into the Court of the District Judge, or into the Court of Wards, as the case may be, shall be a sufficient discharge for the money so paid;

and such money, when paid in, shall be invested in the purchase of Government securities, which, with the interest thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, as the Judge or the Court of Wards, as the case may be, may direct.

#### CHAPTER XI.

OF THE PRODUCE AND INTEREST OF LEGACIES.\*

128. The legatee of a specific legacy is entitled to the clear

Legatee's title to produce produce thereof, if any, from the testator's death.

Exception.—A specific bequest, contingent in its terms, does not comprise the produce of the legacy between the death of the testator and the vesting of the legacy.

The clear produce of it forms part of the residue of the testator's estate.

#### Illustrations

- (a.) A bequeaths his flock of sheep to B. Between the death of A and delivery by his executor, the sheep are shorn, or some of the ewes produce lambs. The wool and lambs are the property of B.
- (b.) A bequeaths his Government securities to B, but postpones the delivery of them till the de ath cf C. The interest which falls due between the death of A and the death of C belongs to B, and must, unless he is a minor, be paid to him as it is received.
- (c.) The testator bequeaths all his four per cent. Government promissory notes to A when he shall complete the age of 18. A, if he complete that age, is entitled to receive the notes, but the interest which accrues in respect of them, between the testator's death and A's completing 18, forms part of the residue.
- 129. The legatee under a general residuary bequest is Residuary legatee's title to produce of residuary fund. entitled to the produce of the residuary fund from the testator's death.

Exception.—A general residuary bequest contingent in its terms does not comprise the income which may accrue upon the

<sup>\*</sup> Compare Act X. of 1865, Pt. XXXVIII.

fund bequeathed between the death of the testator and the vesting of the legacy.

Such income goes as undisposed of.

#### Illustrations.

- (a) The testator bequeaths the residue of his property to a minor, to be paid to him when he shall complete the age of 10. The income from the testator's death belongs to A.
- (b.) The testator bequeaths the residue of his property to A when he shall complete the age of 18. A, if he complete that age, is entitled to receive the residue. The income which accrued in respect of it since the testator's death goes as undisposed of.
- 130. Where no time has been fixed for the payment of a lateres: when no time fixed for payment of general legacy, interest begins to run from the expiration of one year from the testator's death

Exceptions.—(1) Where the legacy is bequeathed in satisfaction of a debt, interest runs from the death of the testator.

- (2) Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, the legacy shall bear interest from the death of the testator.
- (3) Where a sum is bequeathed to a minor with a direction to pay for his maintenance out of it, interest is payable from the death of the testator.
  - 131. Where a time has been fixed for the payment of a general legacy, interest begins to run from the time so fixed.

The interest up to such time forms part of the residue of the testator's estate.

Exception.—Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, and the legatee is a minor, the legacy shall bear interest from the death of the testator, unless a specific sum is given by the will for maintenance, or unless the will contains a direction to the contrary.

Rate of interest.

132. The rate of interest shall be six per cent. per annum.

133. No interest is payable on the arrears of an annuity within the first year from the death of the testator, although a period earlier than the expiration of that year may have been fixed by the will for making the first payment of the annuity.

134. Where a sum of money is directed to be invested to Interest on sum to be inproduce an annuity, interest is payable on it from the deatn; of the testator.

# CHAPTER XII.

# OF THE REFUNDING OF LEGACIES.\*

185. An executor who has paid a legacy under the order of Refund of legacy paid under Judge's orders.

a Judge is entitled to call upon the legatee to refund in the event of the assets proving insufficient to pay all the legacies.

No refund if paid voluntarily paid a legacy, he cannot call upon a legatee to refund in the event of the assets proving insufficient to pay all the legacies.

Refund when legacy becomes due on performance of condition within turther time allowed.

The state of the performance of a condition has elapsed, without the condition having been performed, and the executor has thereupon, without fraud, distributed the assets, in such case, if

further time has, under the second clause of this section, been allowed for the performance of the condition, and the condition has been performed accordingly, the legacy cannot be claimed from the executor, but those to whom he has paid it are liable to refund the amount.

Where the will requires an act to be performed by the legatee within a specified time, either as a condition to be fulfilled before the legacy is enjoyed, or as a condition upon the non-fulfilment of which the subject-matter of the bequest is to go over to another person, or the bequest is to cease to have effect, the act must be

<sup>\*</sup> Compare Act X. of 1865, Pt. XXXIX. The provisions in Ch. XII. as to an executor apply also to an administrator with the will annexed.—See s. 148, infra.

performed within the time specified, unless the performance of it be prevented by fraud: in which case such further time shall be allowed as is requisite to make up for the delay caused by such fraud.

- When each legatee compellable to refund in proportion.

  and he is afterwards obliged to discharge a debt of which he had no previous notice, he is entitled to call upon each legatee to refund in proportion.
- 139.\* Where an executor or administrator has given such notices as the High Court may, by any general rule to be made from time to time, prescribe for creditors and others to send in to him their claims against the estate of the deceased, he shall, at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets to, or any part thereof in discharge of, such lawful claims as he knows of, and shall not be liable for the assets so distributed to any person of whose claim he has not had notice at the time of such distribution;

but nothing herein contained shall prejudice the right of any creditor may follow assets.

Creditor may follow assets.

Creditor or claimant to follow the assets or any part thereof in the hands of the persons who may have received the same respectively.

- Creditor may call upon legatee to refund.

  may call upon a legatee who has received payment of his legacy to refund, whether the assets of the testator's estate were or were not sufficient at the time of his death to pay both debts and legacies and whether the payment of the legacy by the executor was voluntary or not.
- When legatee, not satisfied or compelled to refund under section 140, cannot oblige one paid in full to refund.

  The time of the testator's death, a legatee who has not received payment of his legacy, or who has been compelled to refund, under the last-preceding section, cannot oblige one who has received payment in full to refund, whether the legacy were paid to him with or without suit, although

<sup>\*</sup> For limitation of suits to compel a refund under ss. 130 and 140, see the Indian Limitation Act (XV. of 1877), Sch. II., No. 43.

the assets have subsequently become deficient by the wasting of the executor.

- 142. If the assests were not sufficient to satisfy all the legacies at the time of the testator's death, a When unsatisfied legatee must first proceed against legatee who has not received payment executor, it solvent. of his legacy must, before he can call on a satisfied legatee to refund, first proceed against the executor, if he is solvent; but, if the executor is insolvent, or not liable to pay, the unsatisfied legatee can oblige each satisfied legatee to refund in proportion.
- 143. The refunding of one legatee to another shall not exceed the sum by which the satisfied Limit to refunding of one legatee to another. legacy ought to have been reduced if the estate had been properly administered.

# Illustration.

A has bequesthed 240 rupees to B, 480 rupees to C, and 720 rupees to D. The assets are only 1,200 tupees, and, if properly administered, would give 200 rupees to B, 400 rupees to C, and 600 rupees to D. C and D have been paid their legacies in full, leaving nothing to B. B can oblige C to refund 80 rupees, and D to refund 120 rupees.

Refunding to be without interest.

144. The refunding shall in all cases be without interest.

Residue after usual payments to be paid to residuary legatee.

145. The surplus or residue of the deceased's property, after payment of debts and legacies, shall be paid to the residuary legatee when any has been appointed by the will.

145A.\* Where a person not having his domicile in British India has died, leaving assets both in Transfer of assets from Bri-British India, and, in the country in tish India to executor or administrator in country of which he had his domicile at the time of domicile for distribution. his death, and there have been a grant of probate or letters of administration in British India with respect to the assets there and a grant of administration in the country of domicile with respect to the assets in that country, the executor or administrator, as the case may be, in British India, after having given such notices as are mentioned in section 139, and after

<sup>\*</sup> S. 145A has been inserted by the Probate and Administration Act (II. of 1890), s. 16.

having discharged, at the expiration of the time therein named, such lawful claims as he knows of, may, instead of himself distributing any surplus or residue of the deceased's property to persons residing out of British India, who are entitled thereto, transfer, with the consent of the executor or administrator, as the case may be, in the country of domicile, the surplus or residue to him for distribution to those persons.

# CHAPTER XIII.

Of the Liability of an Executor or Administrator for Devastation.\*

146. When an executor or administrator misapplies the estate

Liability of executor or administrator for devastation.

of the deceased, or subjects it to loss or damage, he is liable to make good the loss or damage so occasioned.

#### Illustrations.

- (a.) The executor pays out of the estate an unfounded claim. He is liable to make good the loss caused by the payment.
- (b.) The deceased had a valuable lease renewable by notice, which the executor neglects to give at the proper time. The executor is liable to make good the loss caused by the neglect.
- (c.) The deceased had a lease of less value than the rent payable for it, but terminable on notice at a particular time. The executor neglects to give the notice. He is liable to make good the loss.
- For neglect to get in any part of property.

  the estate by neglecting to get in any part of the property of the deceased, the is liable to make good the amount.

#### Illustrations.

- (a.) The executor absolutely releases a debt due to the deceased from a solvent person, or compounds with a debtor who is able to pay in full. The executor is liable to make good the amount so lost.
- (b<sub>s</sub>) The executor neglects to sue for a debt till the debtor is able to plead the Act for the limitation of suits, † and the debt is thereby, lost to the estate. The executor is liable to make good the amount of the debt.

<sup>\*</sup> Compare Act X. of 1865, Pt. XL. † See Act XV. of 1877, now Act IX. of 1908.

# CHAPTER XIV.

# MISCELLANLOUS.

Provisions applied to administrator with will annexed.

148. In Chapters VIII., IX., X., and XII. of this Act, the provisions as to an executor shall apply also to an administrator with the will annexed.

Saving clause.

149. Nothing herein contained shall-

- (a) validate any testamentary dispositions which would otherwise have been invalid;
- (b) invalidate any such disposition which would otherwise have been valid;
- (c) deprive any person of any right of maintenance to which he would otherwise have been entitled; or
- (d) affect the rights, duties, and privileges of the Administrator-General of Bengal, Madras, or Bombay.\*
- 150. No proceedings to obtain probate of a will or letters of Probate and administration administration to the estate of any Hindu, in case of persons exempted Muhammadan, Buddhist, or persons exfrom Succession Act to be empted under section 332 of the Indian granted only under this Act. Succession Act, 1865,† shall be instituted in any Court in British India except under this Act.
- 151. [Repeal of portions of Act XXVII. of 1860.] Repealed by the Succession Certificate Act (VII. of 1889).

Grant of probate or administration to supersede certificate under Act XXVII. of 1860 or Bombay Regulation VIII. of 1827.

152. The grant of probate or letters of administration under this Act, in respect of any property, shall be deemed to supersede any certificate previously granted in respect of the same property under! Act No. XXVII of 1860, or Bombay Regulation No. VIII.

of 1827; and when, at the time of the grant of such probate or letters, any suit or other proceeding instituted by the holder of such

<sup>\*</sup> See Act II. of 1874.

<sup>†</sup> Act X. of 1865.

Here the words "the said," being repealed by the Repealing and Amending Act (XII. of 1891), have been omitted.

Act XXVII. of 1860 has been repealed by the Succession Certificate Act (VII. of 1889); but see saving in s. 2 of the latter Act.

certificate regarding such property is pending, the persons to whom such grant is made shall, on applying to the Court in which such suit or proceeding is pending, be entitled to take the place of such holder in such suit or proceeding:

Provided that, when any certificate is superseded under this section, all payments made to the holder of such certificate in ignorance of such supersession shall be held good against claims under the probate or letters of administration.

158. [Amendment of Court Fees Act (VII. of 1870)] Repealed by the Succession Certificate Act (VII. of 1889).

Amendment of Hindu Wills Act 1870. 1590. The following amendments shall be made in the Hindu Wills Act 1870\* (namely):—

- (a.) For the portion of section 2 commencing with the words "section 179," and ending with the words, "administrator with the will annexed," the words, "and section 187," shall be substituted.
- (b.) The third clause of section 3 and the last clause of section 6 shall be repealed.
- (c.) In section 6, for the words "one hundred and three and one hundred and eighty-two," the words "and one hundred and three," shall be substituted.
- Validation of grants of probate of the will or letters of administration of grants of probate and administration made in British Burma.

  of the Indian Succession Act, 1865,† which, before this Act comes into force, have been made in British Burma,‡ shall, whenever such grant would have been lawful if this Act had been in force, be deemed to have been made in accordance with law.

156. [Amendment of Limitation Act, (1877).] Repealed by Act IX. of 1908.

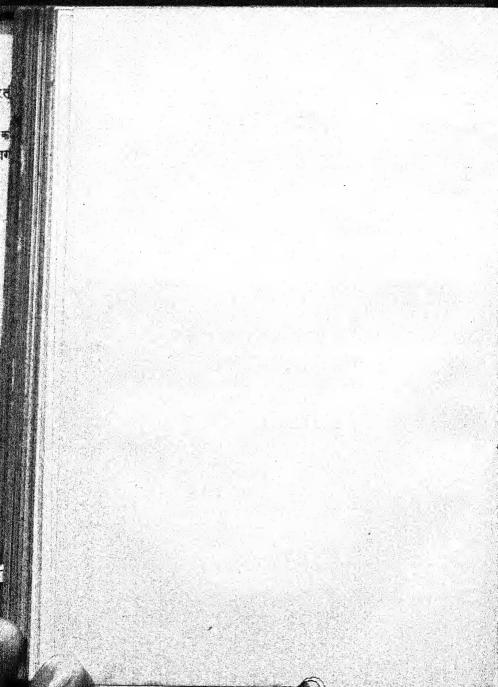
<sup>\*</sup> See Act XXI. of 1870. † Act X. of 1865.

<sup>‡</sup> Read now "Lower Burma." See the Upper Burma Laws Act (XX." of 1886), s. 4.

Surrender of revoked probate or letters of administration. Surrender of revoked probate or letters of administration. Act, the person to whom the grant was made shall forthwith deliver up the probate or letters to the Court which made the grant.

(2) If such person wilfully, and without sufficient cause, omits so to deliver up the probate or letters, he shall be punished with fine which may extend to one thousand rupees, or with imprisonment which may extend to three months, or with both.

<sup>\*</sup> S. 157 has been added by the Probate and Administration Act (VI. of 1889), s. 17.



#### THE

# HINDU WILLS ACT, 1870. ACT XXI. OF 1870.\*

RECEIVED THE G.-G.'S ASSENT ON 19TH JULY 1870.

An Act to regulate the Wills of Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal, and the Towns of Madras and Bombay.

WHEREAS it is expedient to provide rules for the execution, attesta-Preamble. tion, revocation, revival, interpretation, and probate of the wills of Hindus, Jainas, Sikhs, and Bhuddhists in the territories subject to the Lieutenant-Governor of Bengal and in the towns of Madras and Bombay; It is

Short title.

This Act may be called the Hindu Wills Act, 1870.

Certain portions of Act X. of 1865 extended to wills of Hindus, Jamas, Sikhs, and Buddhists.

2. The following portions of the Indian Succession Act, † 1865 namely,

Act XXI. of 1870 has been declared by notification under s. 3 (a) of the Scheduled Districts Act (XIV. of 1874), to be in force in the following

The Districts of Hazaribagh, Lohardaga, and Manbhum, and Pargana Dhalbhum, and the Kolhan in the District of Singbhum.—See Gasette of India, 1881, Pt. 1., p. 504.

The District of Lohardaga included at this time the present District of Palamau, which was separated in 1894.]

it has; been declared to be in force in the Santhal Parganas, by Reg. III. of 1872, s. 3, as amended by the Santhal Parganas Justice and Laws Regulation (III. of 1899), s. 3.

<sup>\*</sup> For the Statement of Objects and Reasons, see Gazette of India, 1860, Pt. V., p. 32; for the first Report of the Select Committee, which was ordered to be published by the Council, see ibid, 1870, Pt. V., p. 11; for Proceedings in Council, see ibid, 1869, Supplement, p. 1499; Supplement, 1870, p. 76, Extra Supplement, p. 34, and Supplement, p. 957.

sections 46, 48, 49, 50, 51, 55, and 57 to 77 (both inclusive), sections 82, 83, 85, 88 to 103, (both inclusive), sections 106 to 177 (both inclusive), "and section 187,"\*

snall, notwithstanding anything contained in section 331 of the said Act, apply,—

(a) to all wills and codicils made by any Hindu, Jaina,
Sikh, or Buddhist, on or
after the first day of
September, 1870,

within the said territories or the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such wills and codicils made outside those territories and limits, so far as relates to immoveable property situated within those territories or limits:

Provisos.

8. Provided that marriage shall not revoke any such will or codicil:

And that nothing herein contained shall authorize a testator to bequeath property which he could not have alienated intervives, or to deprive any persons of any right of maintenance of which, but for section 2 of this Act, he could not deprive them by will.

And that nothing herein contained shall affect any law of adoption or intestate succession:

And that nothing herein contained shall authorize any Hindu, Jaina, Sikh, or Buddhist to create in property any interest which he could not have created before the first day of September, 1870.

<sup>\*</sup> The words and figures, "and section 187," have been substituted, for the portion of s. 2 commencing, with the word and figures "section 179" and ending with the words "administrator with the will annexed," by s. 154 (a) of the Probate and Administration Act (V. of 1881).

The words, "And that nothing herein contained shall vest in the executor or administrator with the will annexed of a deceased person any property which such person could not have alienated inter vivos:" repealed by s. 154 (b) of the Probate and Administration Act (V. of 1881), have here been omitted.

- 4. On and from that day, section 2 of Bengal Regulation V.

  Partial repeal of Bengal of 1799 shall be repealed, so far as reRegulation V. of 1799, seclates to the executors of persons who
  are not Muhammadans, but are subject
  to the jurisdiction of a District Court in the territories subject to
  the Lieutenant-Governor of Bengal.
- 5. Nothing contained in this Act shall affect the rights, duties, Saving of rights of Administrators-General.

  General of Bengal, Madras, and Bombay, respectively.\*
- 6. In this Act and in the said sections† of the Indian Succession Act,‡ all words defined in section 3 of the same Act shall, unless there be something repugnant in the subject or context, be deemed to have the same meaning as the said section 3 has attached to such words respectively.

And in applying sections 62, 63, 92, 96, 98, 99, 100, 101, 102, "and 103" of the said Succession Act to wills and codicils made under this Act, the words "son," "sons," "child "and "children," shall be deemed to include an adopted child; and the word "grandchildren" shall be deemed to include the children, whether adopted or natural-born, of a child, whether adopted or natural-born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son.

<sup>\*</sup> See the Administrator-Generals Act (III. of 1874).

<sup>†</sup> The words "and Parts," repealed by the Repealing and Amending Act (XII. of 1891), have here been omitted.

<sup>‡</sup> Act X. of 1865.

<sup>§</sup> The word and figures "and 103" have been substituted for the word and figures "103 and 182" by s. 154 (c) of the Probate and Administration Act (V. of 1881).

I The last clause of s. 6, as to the making of grants of letters of administration, repealed by s. 154 (b) of the Probate and Administration Act (V. of 1881), has here been omitted.

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# THE INDIAN CONTRACT ACT (NO. 1X.), 1872.

# CONTENTS.

#### PREAMBLE.

# PRELIMINARY.

#### SECTIONS.

- I. Short title. Extent. Commencement.
  - Enactments repealed.
- 2. Interpretation clause:
  - " Proposal :"
    " Promise :"
  - "Promisor" and "Pro-
  - "Consideration:"
  - " Agreement :"
  - "Reciprocal promises :"
  - "Void agreement :"
  - "Voidable contract:"
  - "Void contract:"

# CHAPTER I.

OF THE COMMUNICATION, ACCEPTANCE, AND REVOCATION OF PROPOSALS.

- 3. Communication, acceptance, and revocation of proposals.
- 4. Communication when com-
- 5. Revocation of proposals and acceptances.
- 6. Revocation how made.
- 7. Acceptance must be absolute.
- 8. Acceptance by performing conditions, or receiving consideration.

# SECTIONS.

9. Promises, express and implied.

# CHAPTER II.

OF CONTRACTS, VOIDABLE CONTRACTS, AND VOID AGREEMENTS.

- 10. What agreements are con-
- 11. Who are competent to con-
- 12 What is a sound mind for the purposes of contracting.
- 13. 'Consent' defined.
- 14. 'Free consent defined.
- 15. 'Coercion 'defined.
- 16. 'Undue influence' defined.
- 18. 'Misrepresentation 'defined.
- 19. Voidability of agreements without free content
- 19A. Power to set as de contract induced by undue influence.
- 20. Agreement void where both parties are under mistake as to matter of fact.

# Void Agreements.

- 21. Effect of mistakes as to law.
- Contract caused by mistake of one party as to matter of fact.
- 23. What considerations and objects are lawful, and what not.
- Agreements void if considerations and objects unlawful in part.

Act IX., 1872,-1.

25. Agreement without consideration void unless—

it is in writing and registered.

or is a promise to compensate for something done, or is a promise to pay a debt

barred by Limitation Law. 26. Agreement in restraint of marriage void.

27. Agreement in restraint of trade

Saving of agreement not to carry on business of which good will is sold:

of agreement between partners prior to dissolution; or during continuance of

partnership.

28. Agreements in restraint of legal

proceedings void.

Saving of contract to refer to arbitration dispute that may arise. Suits barred by such contracts. Saving of contract to refer questions that have already arisen.

 Agreements void for uncertainty.

30. Agreements by way of wager

Exception in favour of certain prizes for horse-racing.

Section 294A of the Indian Penal Code not affected.

# CHAPTER III.

# OF CONTINGENT CONTRACT.

31. 'Contingent contract' defined.

32. Enforcement of contracts contingent on an event happening.

33. Enforcement of contracts contingent on an event not hap-

pening

34. When event on which contract is contingent to be deemed impossible if it is the future conduct of a living person.

#### SECTIONS.

35. When contracts become void which are contingent on happening of specified event within fixed time.

> When contracts may be enforced which are contingent on specified event not happening within fixed time.

36. Agreements contingent on impossible events void.

37. Obligation of parties to contracts.

# CHAPTER IV.

# OF THE PERFORMANCE OF CONTRACTS.

Contracts which must be performed.

38. Effect of refusal to accept offer of performance.

 Effect of refusal of party to perform promise wholly.

By whom Contracts must be performed.

 Person by whom promise is to be performed.

41. Effect of accepting performance from third person

42. Devolution of joint liabilities.

43. Any one of joint promisors may be compelled to perform.

Each promisor may compel contribution.

Sharing of loss by default in

contribution.
44. Effect of release of one joint

contractor.
45. Devolution of joint rights.

# Time and Place for Performance.

 Time for performance of promise where no application is to be made, and no time is specified.

47. Time and place for performance of promise on certain day, and no application to be made.

 Application for performance on certain day to be at proper time and place.

 Place for performance of promise where no application to be made, and no place fixed for performance.

 Performance in manner or at time prescribed or sanctioned by promisee.

# Performance of Reciprocal Promises.

 Promisor not bound to perform unless reciprocal promisee ready and willing to perform.

52. Order of performance of reciprocal promises.

 Liability of party preventing event on which contract is to take effect.

54. Effect of default as to that promise which should be first performed in contract consisting of reciprocal promises.

55. Effect of failure to perform at fixed time in contract in which time is essential.

Effect of such failure when time

is not essential. Effect of acceptance of perform-

ance at time other than that agreed upon.

 Agreement to do impossible act.
 Contract to do act afterwards becoming impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.

57. Reciprocal promises to do things legal, and also other things illegal.

58. Alternative promise, one branch being illegal.

# Appropriation of Payments.

 Application of payment where debt to be discharged is indicated.

#### SECTIONS.

60. Application of payment where debt to be discharged is not indicated.

 Application of payment where neither party appropriates.

# Contracts which need not be performed.

62. Effect of novation, rescission, and alteration of contract.

 Promisee may dispense with or remit performance of promise.

Consequences of rescission of voidable contract.

 Obligation of person who has received advantage under void agreement or contract that becomes void.

 Mode of communicating or revoking rescission of voidable contract.

 Effect of neglect of promisee to afford promisor reasonable facilities for performance.

# CHAPTER V.

- OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT.
  - 68. Claim for necessaries supplied to person incapable of contracting, or on his account.
  - Re-imbursement of person paying money due by another, in payment of which he is interested.
- 70. Obligation of person enjoying benefit of non-gratuitous act.
- 71. Responsibility of finder of goods.
- Liability of person to whom money is paid, or thing delivered, by mistake or under coercion.

#### CHAPTER VI.

#### OF THE CONSEQUENCES OF BREACH OF CONTRACT.

73. Compensation for loss or damage caused by breach of contract.

Compensation for failure to discharge obligation resembling those created by contract.

74. Compensation for breach of contract where penalty stipulated for.

75. Party rightfully rescinding contract entitled to compensa-

#### CHAPTER VII.

#### SALE OF GOODS.

# When Property in Goods sold passes.

76. 'Goods' defined.

77. 'Sale' defined.

78 Sale how effected,

- Transfer of ownership of thing sold which has yet to be ascertained, made or finished.
- 80. Completion of sale of goods which the seller is to put into state in which buyer is to take
- 81. Completion of sale of goods when seller has to do anything thereto in order to a certain price.

82. Completion of sale when goods are unascertained at date of contract.

83. Ascertainment of goods by subsequent appropriation.

84. Ascertainment of goods be seller's selection.

85. Transfer of ownership of moveable property when sold together with immoveable.

86. Buyer to bear loss after goods have become his property.

#### SECTIONS.

- 87. Transfer of ownership of goods agreed to be sold while non-existent.
- 88. Contract to sell and deliver, at a future day, goods not in seller's possession at date of contract.
- Determination of price not fixed by contract.

#### Delivery.

- 90. Delivery how made.
- Effect of delivery to wharfinger or carrier.
- 92. Effect of part-delivery.
- Seller not bound to deli ver until buyer applies for deli very.
- 94. Place of delivery.

#### Seller's Lien.

- 95. Seller's lien.
- c6. Lien where payment to be made at a future day, but no time fixed for delivery. 'Insolvency' defined.
- Seller's lien where payment to be made at future day, and buyer allows goods to remain in seller's possession.
- 98. Seller's lien against subsequent buyer.

# Stoppage in Transit.

- 99. Power of seller to stop in transit.
- 100. When goods are to be deemed in transit.
- 101. Continuance of right of stop-
- 102. Cessation of right on assignment by buyer of bill-oflading.
- 103. Stoppage where bill-of-lading is pleaged to secure specific advance.
- 104. Stoppage how effected.
- 105. Notice of seller's claim.
- 106. Right of seller on stoppage.

#### Re-sale.

107. Re-sale on buyer's failure to perform.

#### Title.

108. Title conveyed by seller of goods to buyer.

#### Warranty.

- 109. Seller's responsibility for badness of title.
- ranty of goodness or quality.
- III. Warranty of soundness implied on sale of provisions.
- 112. Warranty of bulk implied on sale by sample.
- 113 Warranty implied where goods are sold as being of a certain denomination.
- 114 Warranty where goods ordered for a specified purpose
- 115. Warranty on sale of article of well known ascertained kind.
- 116. Seller when not responsible for latent defects.
- 117. Buyer's right on breach of warranty.
- 118. Right of buyer on breach of warranty in respect of goods not ascertained.

#### Miscellaneous.

- 119. When buyer may refuse to accept if goods not ordered are sent with goods ordered.
- 120. Effect of wrongful refusal to accept.
- 121. Right of seller as to rescission on failure of buyer to pay price at time fixed.
- 122. Sale and transfer of lots sold by auction.
- 123. Effect of use, by seller, of pretented biddings to raise price.

#### SECTIONS.

#### CHAPTER VIII.

- OF INDEMNITY AND GUARANTER.
- 124. 'Contract of indemnity' defined.
- 125. Rights of indemnity-holder, when sued.
- 126. 'Contract of guarantee,' 'surety,' 'principal debtor,' and 'creditor.'
- 127. Consideration for guarantee.
  128. Surety's liability
- 129. 'Continuing guarantee.'
- 130. Revocation of continuing gua-
- 131. Revocation of continuing guarantee by surety's death.
- 132. Liability of two persons primarily liable not affected by arrangement between them that one shall be surety on other's default.
- 133. Discharge of surety by variance in terms of contract.
- 134. Discharge of surety by release or discharge of principal debtor.
- 135. Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.
- 136. Surety not discharged when contract made with third person to give time to principal debtor.
- 137. Creditor's forbear nce to sne does not discharge surety.
- 138. Release of one co-surety does not discharge others.
- Discharge of surety by creditor's act or omission impairing surety's eventual remedy.
- 140. Rights of surety on payment or performance.
- 141. Surety's right to benefit of creditor's securities.
- 142. Guarantee obtained by misrepresentation invalid.

- 143. Guarantee obtained by concealment invalid.
- 144. Guarantee on contract that creditor shall not act on it until co-surety joins.
- 145. Implied promise to indemnify surety.
- 146. Co-sureties liable to contribute equally.
- 147. Liability of co-sureties bound in different sums.

# CHAPTER IX.

#### OF BAILMENT.

- 148. 'Bailment,' 'bailor,' and 'bailee' defined.
- 149. Delivery to bailee how made.
- 150. Bailor's duty to disclose faults in goods bailed.
- 151. Care to be taken by bailee.
- 152. Bailee when not liable for loss, &c., of thing bailed.
- 153. Termination of bailment by bailee's act inconsistent with conditions.
- \$54. Liability of bailee making unauthorized use of goods bailed.
- 455. Effect of mixture, with bailor's consent of his goods with bailee's.
- 156. Effect of mixture, without bailor's consent, when the goods can be separated.
- 157. Effect of mixture, without bailor's consent, when the goods
- cannot be separated.

  358. Re-payment, by bailor, of necessary expenses
- 150. Restoration of goods lent gratuitously
- afo. Return of goods bailed on expiration of time or accomplishment of purpose.
- 161. Bailee's responsibility when goods are not duly returned.
- 262. Termination of gratuitous bailment by death.

#### SECTIONS.

- 163. Bailor entitled to increase or profit from goods bailed.
- 164. Bailor's responsibility to bailee.
- owners.

  166. Bailee not responsible on re-
- delivery to bailor without title.
- 167. Right of third person claiming goods bailed.
- 168. Right of finder of goods; may sue for specific reward offered.
- 169. When finder of thing commonly on sale may sell it.
- 170. Bailee's particular lien.
- General lien of bankers, factors, wharfingers, attorneys, and policy-brokers.

# Bailment of Pledges,

- 172. 'Pledge,' 'pawnor,' and 'pawnee' defined.
- 173. Pawnee's right of retainer.
- 174. Pawnee not to retain for debt or promise other than that for which goods pledged.
  - Presumption in case of subsequent advances.
- 175. Pawnee's right as to extraordinary expenses incurred.
- 176. Pawnee's right where pawnor makes default.
- 177. Defaulting pawnor's right to redeem.
- 178. Pledge by possessor of goods or of documentary title to goods.
- 179. Pledge where pawnor has only a limited interest.

# Suits by Bailees or Bailors against Wrong-doers.

- 180. Suit by bailor or bailee against wrong doer.
- Apportionment of relief or compensation obtained by such suits.

#### CHAPTER X.

#### AGENCY.

#### Appointment and Authority of Agents.

182. 'Agent' and 'principal' defined.

183. Who may employ agent.

184. Who may be an agent.

185. Consideration not necessary.

186. Agent's authority may be expressed or implied.

187. Definitions of express and implied authority.

188. Extent of agent's authority.

189. Agent's authority in an emergency.

# Sub-agents.

190. When agent cannot delegate.

191. 'Sub-agent' defined.

192. Representation of principal by sub-agent properly appointed. Agent's responsibility for subagent.

Sub-agent's responsibility. 103. Agent's responsibility for subagent appointed without au-

thority.

194. Relation between principal and person duly appointed by agent to act in business of agency.

195. Agent's duty in naming such person.

#### Ratification.

106. Right of person as to acts done for him without his authority. Effect of ratification.

107. Ratification may be expressed or implied.

108. Knowledge requisite to valid ratification.

roo. Effect of ratifying unauthorized act forming part of a transaction.

200. Ratification of unauthorized act | 210. When agent's remuneration cannot injure third person.

#### SECTIONS.

# Revocation of Authority.

201. Termination of Agency.

202. Termination of agency where agent has an interest in subject matter.

203. When principal may revoke

agent's authority.

204. Revocation where authority has been partly exercised.

205. Compensation for revocation by principal or renunciation by agent.

206. Notice of revocation or renunciation.

207. Revocation and renunciation may be expressed or implied.

208 When termination of agent's authority takes effect as to agent, and as to third persons.

200. Agent's duty on termination of agency by principal's death or insanity.

210. Termination of sub-agent's authority.

# Agent's duty to Principal.

211. Agent's duty in conducting principal's business.

212. Skill and diligence required from agent.

213. Agent's accounts

214. Agent's duty to communicate with principal,

215. Right of principal when agent deals, on his own account, in business of agency without principal's consent.

216. Principal's right to benefit gained by agent dealing on his own account in business of agency

217. Agent's right of retainer out of sums received on principal's account.

218. Agent's duty to pay sums received for principal.

becomes due.

220. Agent not entitled to remuneration for business misconducted.

Agent's lien on principal's property.

#### Principal's Duty to Agent.

222. Agent to be indemnified against consequences of lawful acts.

223. Agent to be indemnified against consequences of acts done in good taith.

224. Non-liability of employer of agent to do a criminal act.

225. Compensation to agent for injury caused by principal's neglect.

#### Effect of Agency on Contract with Third Persons.

226. Enforcement and consequences of agent's contracts.

227. Principal how far bound when agent exceeds authority.

228. Principal not bound when excess of agent's authority is not separable.

229. Consequences of notice given to agent.

230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.

> Presumption of contract to contrary.

231. Rights of parties to a contract made by agent not disclosed.

232. Performance of contract with agent supposed to be principal.

233. Right of person dealing with agent personally liable.

234. Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable.

235. Liability of pretended agent.

236. Person falsely contracting as agent not entitled to performance.

#### SECTIONS.

237. Liability of principal inducing belief that agent's unauthorized acts were authorized.

238. Effect, on agreement, of misrepresentation or fraud by agent.

#### CHAPTER XI.

# OF PARTNERSHIP.

239. 'Partnership' defined. 'Firm' defined.

 Lender not a partner by advancing money for share of profits.

241. Property left in business by retiring partner or deceased partner's representative.

242. Servant or agent remunerated by share of profits not a partner.

243. Widow or child of deceased partner receiving annuity out of profits not a partner.

244. Person receiving portion of profits for sale of good-will not a partner.

245. Responsibility of person leading another to believe him a partner.

246. Liability of person permitting himself to be represented as a partner.

247. Minor partner not personally liable, but his share is.

248. Liability of minor partner on attaining majority.

249. Partner's liability for debts of partnership

250. Partner's liability to third person for neglect or fraud of co-partner.

251. Partner's power to bind co-

252. Annulment of contract defining partner's rights and obligations.

- 253. Rules determining partners' mutual relations where no contract to Contrary.
- 254. When Court may dissolve partnership.
- 255. Dissolution of partnership by prohibition of business.
- 256 Rights and obligations of partners in partnership continued after expiry of term for which it was entered into.
- 257. General duties of partners. 258. Account, to firm, of benefit
- derived from transaction affecting partnership.
- 259. Obligations, to firm, of partner carrying on competing business.
- 260. Revocation of continuing guarantee by change in firm.

#### SECTIONS.

- Non-liability of deceased partner's estate for subsequent obligations.
- 262. Payment of partnership-debts and of separate debts.
- 263. Continuance of partner's rights and obligations after dissolution.
- 264. Notice of dissolution.
- 265. Winding-up by Court on dissolution or after termination.
- 266. Limited liability partnerships, incorporated partnerships, and joint-stock companies.

#### SCHEDULE.

ENACTMENTS REPEALED.

# THE INDIAN CONTRACT ACT

(No. IX.), 1872.\*

[As modified up to 31st December 1910.]

(RECEIVED THE G.-G.'s ASSENT ON THE 25TH APRIL, 1872.)

WHEREAS it is expedient to define and amend certain parts of the law relating to contracts; It is hereby Preamble. enacted as follows :-

# PRELIMINARY.

Short title.

1. This Act may be called "The Indian Contract Act, 1872."

Extent : Commencement.

It extends to the whole of British India and it shall come into force on the first day of September 1872.

\* For the Statement of Objects and Reason for the Bill, which was based on a Report of Her Majesty's Commissioners appointed to prepare a body of substantive law for India, dated July 6, 1866, see Gazette of India, 1867, Extraordinary, p. 34. For the Report of the Select Committee, see ibid, 1871, p. 313, and ibid, 1872, p. 527.

The chapters and sections of the Transfer of Property Act (IV. of 1882) which relate to contracts are, in places in which that Act is in force, to be taken as part of Act IX. of 1872 .- See Act IV. of 1882, s. 4.

† Act IX. of 1872 has been declared in force in-

(1) the Santhal Parganas [see the Santhal Parganas Settlement Regulation (III. of 1872) as amended by the Santhal Parganas Laws Regulation (III. of 1899), s. 3];

(2) the Arakan Hill District [see the Arakan Hill District Laws

Regulation (IX. of 1874), s. 3 ;

(3) Upper Burma (except the Shan States), by Act XIII. of 1898, s. 4; (4) British Baluchistan | see the British Baluchistan Laws Regula-

tion (I of 1890), s 3]. Act IX. of 1872 has been declared, by notification under s. 3 (a) of the Scheduled Districts Act (XIV. of 1874), to be in force in-

(1) the North-Western Provinces Tarai (See Gasette of India, 1876.

Pt I., p. 505); (2) the Districts of Hazaribagh, Lohardaga, and Manbhum, and Pargana Dhalbhum, and the Kolhan in the District of Singbhum (see Gasette of India, 1881, Pt. I., p. 504). The District of Lohardaga included at this time the present District of Palamau, which was separated in 1894.

Act IX. of 1872 has been extended, by notification under s. 5 of the Scheduled Districts Act (XIV. of 1874), to the whole of Upper Burma, except the Shan States (see Gasette of India, 1893, Pt. II., p. 272).

- \*Nothing herein contained shall affect the provisions of any
  Enactments repealed.

  Statute, Act, or Regulation not hereby
  expressly repealed, nor any usage or
  with the provisions of this Act.
  - 2. In this Act the following words and expressions are used in the following senses unless a contrary intention appears from the context:—
- (a.)—When one person signifies to another his willingness to "Proposal:"

  do or to abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal:
- (b.)—When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted,† becomes a promise:
- (c.)—The person making the proposal is called the "promisor," "Promisor" and "pro- and the person accepting the proposal is misee:" called the "promisee:"
- (d.)—When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise:
  - "Agreement:"

    (e.)—Every promise and every set of promises, forming the consideration for each other, is an agreement:
  - "Reciprocal promises:"

    (/-)—Promises which form the consideration for each other are called reciprocal promises
- "Void agreement:"

  (g.)—An agreement not enforceable by law is said to be void:
- "Contract:"

  (h.)—An agreement enforceable by law is a contract:

<sup>\*</sup> In section 1, the words from "The enactments" to "thereof; but" have been repealed by Act X. of 1914.

† But see s. 4, Ill. (b.), infra.

- (i)—An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract:
- "Void contract." which ceases to be enforceable by law becomes void when it ceases to be enforceable.

# CHAPTER I.

OF THE COMMUNICATION, ACCEPTANCE, AND REVOCATION OF PROPOSALS.

- 3. The communication of proposals, the acceptance of proCommunication, acceptance, and revocation of proand acceptances, respectively, are deemposals.

  ed to be made by any act or omission
  of the party proposing, accepting, or revoking, by which he intends
  to communicate such proposal, acceptance, or revocation, or which
  has the effect of communicating it.
- 4. The communication of a proposal is complete when it Communication when comcomes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

as against the person to whom it is made, when it comes to his knowledge.

# Illustrations.

(a.) A proposes, by letter, to sell a house to B at a certain price:

The communication of the proposal is complete when B receives the letter.

(b.) B accepts A's proposal by a letter sent by post: The communication of acceptance is complete, as against A, when the letter is posted;

as against B, when the letter is received by A.

(c.) A revokes his proposal by telegram:

The revocation is complete as against A, when the telegram is despatched. It is complete as against B when B receives it.

B revokes his acceptance by telegram: B's revocation is complete, as against B, when the telegram is despatched, and, as against A, when it reaches him.

5. A proposal may be revoked at any time before the commu-Revocation of proposals and acceptances. nication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

#### Illustrations.

A proposes, by a letter sent by post, to sell his house to B. B accepts the proposal by a letter sent by post:

A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards.

Revocation how made.

# 6. A proposal is revoked—

- (1) by the communication of notice of revocation by the proposer to the other party;
- (2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so pre-cribed, by the lapse of a reasonable time without communication of the acceptance;
- (3; by the failure of the acceptor to fulfil a condition precedent to acceptance; or
- (4) by the death or insanity of the proposer if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

Acceptance must be absolute. 7. In order to convert a proposal into a promise, the acceptance must—

- (1) be absolute and unqualified;
- (2) be expressed in some usual and reasonable manner unless the proposal prescribes the manner in which it is to be accept.

- ed. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance.
- 8. Performance of the conditions of a proposal, or the acceptance by performing conditions or receiving consideration.

  ance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.
- 9. In so far as the proposal or acceptance of any promise is

  Promises, express and immade in words, the promise is said to be plied.

  express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

# CHAPTER II.

# OF CONTRACTS, VOIDABLE CONTRACTS, AND VOID AGREEMENTS.

10. All agreements are contracts\* if they are made by the free What agreements are consent of parties competent to contract tracts.

for a lawful consideration,† and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in British India and not hereby expressly repealed, by which any contract is required to be made in writing; or in the presence of witnesses, or any law relating to the registration of documents.

<sup>\*</sup> See s. 2, cl. (h), supra.

<sup>†</sup> See s. 25, Expl. 2, and s. 102 infra.

<sup>‡</sup> See, for example, the following :-

<sup>(1)</sup> S. 25, infra;

<sup>(2)</sup> the Indian Copyright Act (XX. of 1847), s. 5;

<sup>(3)</sup> the Conveyance of Land Act (XXXI. of 1854) ss. 14, 18; (4) the Merchant Shipping Act (Stat. 57 & 58 Vict, c. 60), s. 24;

<sup>(5)</sup> the Presidency Banks Act (XI of 1876), s q;

<sup>(6)</sup> the Transfer of Property Act (IV. of 1882), ss. 54, 59, 107, 123;

<sup>(7)</sup> the Indian Companies Act (VI. of 1882), ss. 6, 39, 46, 67;

<sup>(8)</sup> the Apprentices Act (XIX. of 1850), s. 8;
Cf. also s. 4 of the Workmen's Breach of Contract Act

G. also s. 4 of the Workmen's Breach of Contract Act (XIII. of 1859); and the Carriers Act (III. of 1865), ss. 6, 7.

<sup>4</sup> See now the Indian Registration Act (XVI. of 1908).

- Who are competent to of majority according to the law to which contract.

  he is subject,\* and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.
- 12. A person is said to be of sound mind for the purpose of
  What is a sound mind for making a contract if, at the time when
  the purposes of contracting. he makes it, he is capable of understanding it, and of forming a rational judgment as to its effect upon his
  interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.†

# Illustrations.

- (a.) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.
- (b.) A sane man, who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.
  - 13. Two or more persons are said to consent when they "Consent" defined. agree upon the same thing in the same sense.

"Free consent" defined.

14. Consent is said to be free when it is not caused by—

- (1) coercion as defined in section 15, or
- (2) undue influence as defined in section 16, or
- (3) fraud as defined in section 17, or
- (4) misrepresentation as defined in section 18, or
- (5) mistake, subject to the provisions of sections 20, 21, and 22.

† But see s. 68, infra.

<sup>\*</sup> See the Indian Majority Act (IX. of 1865). For exception to this rule in the case of emigrants, see s. 11 of the Assam Labour and Emigration Act (I. of 1882) and s. 39 of the Indian Emigration Act (XXI. of 1883).

16 CONTRACT

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or misrake.

15. "Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal "Coercion" defined. Code,\* or the unlawful detaining, or threatening to detain, any property to the prejudice of any person whatever with the intention of causing any person to enter into an agreement.

Explanation.—It is immaterial whether the Indian Penal Code\* is or not in force in the place where the coercion is employed.

#### Illustration.

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code.

A afterwards sues B for breach of contract at Calcutta:

- A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Indian Penal Code was not in force at the time when, or place where, the act was done.
- 16.† (1) A contract is said to be induced by "undue influence" defluence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other, and uses that position to obtain an unfair advantage over the other.
- (2) In particular, and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—
  - (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
  - (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.
- (3) Where a person who is in a position to dominate the will of another enters into a contract with him, and the transaction

<sup>\*</sup> Act XLV. of 1860. † S. 16 has been substituted for the original by the Indian Contract Act Amendment Act (VI. of 1899), s. 2.

appears, on the face of it, or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provision of section 111 of the Indian Evidence Act, 1872.\*

#### Illustrations.

- (a.) A, having advanced money to his son, B, during his minority, upon B's coming of age, obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance: A employs undue influence.
- (b.) A, a man enteebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services: B employs undue influence.
- (c.) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable: It lies on B to prove that the contract was not induced by undue influence.
- (d.) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of in rerest. A accepts the loan on these terms. This is a transaction in the oldmary course of business, and the contract is not induced by undue influence.
- 17. "Fraud" means and includes any of the following acis
  "Fraud" defined. committed by a party to a contract, or
  with his connivance, or by his agent,†
  with intent to deceive another party thereto or his agent, or to induce
  him to enter into the contract:—
  - (1.)—The suggestion, as a fact, of that which is not true by one who does not believe it to be true:
  - (2.)—The active concealment of a fact by one having knowledge or belief of the fact:
  - (3.)—A promise made without any intention of performing it:
  - (4.) Any other act fitted to deceive:
  - (5.)—Any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud unless

the circumstances of the case are such that, regard being had to them, it is tue duty of the person keeping silence to speak,\* or unless his silence is in itself equivalent to speech.

#### Illustrations.

- (a.) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness: This is not fraud in A.
- (b.) B is A's daughter, and has just come of age: Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.
- (c.) B says to A, "if you do not deny it, I shall assume that the horse is sound." A says nothing: Here A's silence is equivalent to speech.
- information of a change in prices which would affect B's willingness to proceed with the contract: A is not bound to inform B.
- "Misrepresentation" de- 18. "Misrepresentation" means and includes—
- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;
- (3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which he the subject of the agreement.
- 19. When consent to an agreement is caused by coercion, Voidability of agreements without free consent.

  Traud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

18

<sup>\*</sup> See s. 143, infra.

<sup>7</sup> In s. 19, the words, "undue influence," have here been omitted, being repealed by the Indian Contract Act Amendment Act (VI. of 1899), s. 3.

Exception.—If such consent was caused by misrepresentation or by silence fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

# Illustrations.

- (a.) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory: The contract is voidable at the option of B.
- (b.) A, by a misrepresentation, leads B erroneously to believe that five hundred maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this B buys the factory: The contract is not voidable on account of A's misrepresentation.
- (c.) A fraudulently informs B that A's estate is free from incumbrance. B thereupon buys the estate. The estate is subject to a mortgage: B may either avoid the contract, or may insist on its being carried out, and the mortgage-debt redeemed.
- (d.) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value: The contract is voidable at the option of A.
- (e.) A is entitled to succeed to an estate at the death of B. B dies. C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate: The sale is voidable at the option of A.
- 19A.\* When consent to an agreement is caused by undue

  Power to set aside coninfluence, the agreement is a contract
  react induced by undue invoidable at the option of the party whose
  fluence.

  consent was so caused.

Any such contract may be set aside either absolutely, or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

<sup>\*</sup> S. 19A has been added by the Indian Contract Act Amendment Act (VI. of 1899), s. 3.

- (a.) A's son has forged B's name to a promissory note. B, under threat of prosecuting A's son, obtains a bond from A for the amount of the forged note: If B sues on this bond, the Court may set the bond aside.
- (b.) A, a money lender, advances Rs. 100 to B, an agriculturist, and, by undue influence, induces B to execute a band for Rs. 200 with interest at 12 per cent. per month: The Court may set the band aside, ordering B to repay the Rs. 100 with such interest as may seem just.

Agreement void where both parties are under mistake as to matter of fact.

20. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

### Illustrations.

- (a.) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conving the cargo had been cast away, and the goods lost. Neither party was aware of these facts: The agreement is woid.
- (b) A agrees to buy from B acertain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact: The agreement is void.
- (c.) A, being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement, but both parties were ignorant of the fact: The agreement is void.
- 21. A contract is not voidable because it was caused by a mistake as to any law in torce in British India; but a mistake as to a law not in torce in British India has the same effect as a mistake of fact.

### Illustration.

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation: The contract is not voidable.

A and B make a contract grounded on an erroneous belief as to the law regulating bills of exchange in France: The contract is voidable.

Contract caused by mistake of one party as to matter of fact.

22. A contract is not voidable merely because it was coused by one of the parties to it being under a mistake as to a matter of fact.

What considerations and objects are lawful, and what ject of an agreement is lawful not.

it is forbidden by law;\* or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent: or

involves or implies injury to the person or property of another, or the Court regards it as immoral† or opposed to public policy.‡

in each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement, of which the object or consideration is unlawful, is void.

- (a.) A agrees to sell his house to B for 10,000 rupees. Here B's promise to pay the sum of 10,000 rupees is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the 10,000 rupees. These are lawful considerations.
- (b.) A promises to pay B 1,000 rupees at the end of six months if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.
- (c.) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment, and B's payment is the consideration for A's proc ise: and these are lawful considerations.
- (d.) A promises to maintain B's child, and B promises to pay A 1,000 rupees yearly for the purpose. Here, the promise of each party is the consideration for the promise of the other party: They are lawful considerations.
- (e<sub>s</sub>) A, B, and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud: The agreement is void, as its object is unlawful.
- (1.) A promises to obtain for B an employment in the public service and B promises to pay 1,000 rupees to A: The agreement is void, as the consideration for it is unlawful.
- (g.) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal: The agreement between A and B is void, as it implies a fraud by concealment by A on his principal.

<sup>\*</sup> See ss. 26, 27, 28, 30, infra.

<sup>†</sup> See g B. L. R. (App.) 37.

<sup>‡</sup> See 4 B. L. R. (O. C. J.) 1; 9 B. L. R. (App.) 38; 11 B. L. R. 129.

- (A.) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken : The agreement is void, as its object is unlawful.
- (i.) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate, B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid: The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law-
- (j.) A, who is B's mukhtar, promises to exercise his influence as such with B in favour of C., and C promises to pay 1,000 rupees to A: The agreement is void, because it is immoral.
- (k.) A agrees to let her daughter to hire to B for concubinage: The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code.

# Void Agreements.

Agreements void if consis deration and objects unlawful in part.

24. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

# Illustration

A promises to superintend, on behalf of B, a legal manufacture of indigo and an illegal traffic in other articles. B promises to pay to A a salary of 10,000 rupees a year: The argeement is void the object of A's promise, and the consideration for B's promise, being in part unlawful.

Agreement without consideration void unless-

25. An agreement made without consideration is void unless-

(1) it is expressed in writing, and registered under the law for it is in writing and regis- the time being in force for the registration of documents, and is made on tered; account of natural love and affection between parties standing in a near relation to each other; or unless

In s. 25, the word "documents" has been substituted for the word "assurances" by the Repealing and Amending Act (XII. of 1891). For the law relating to the registration of documents, see now the Indian Registration Act (XVI. of 1908).

- (2) it is a promise to compensate, wholly or in part, a person or is a promise to compensure who has already voluntarily done somesate for something done; thing for the promisor, or something which the promisor was legally compellable to do; or unless
- (3) it is a promise, made in writing, and signed by the person or is a promise to pay a to be charged therewith, or by his agent debt barred by Limitation generally or specially authorized in that behalf, to pay, wholly or in part, a debt of which the creditor might have enforced payment but for the law for the limitation of suits.\*

In any of these cases, such an agreement is a contract.

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and dones, of any gift actually made.

Explunation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

- (a.) A promises, for no consideration, to give to B Rs. 1,000: This is a void agreement.
- (b.) A, for natural love and affection, promises to give his son, B. Rs. 1,000. A puts his promise to B into writing, and registers it: This is a contract.
- (c.) A finds B's purse, and gives it to him. B promises to give A Rs. 50: This is a contract.
- (d.) A supports B's infant son. B promises to pay A's expenses in so doing: This is a contract.
- (e.) A owes B Rs. 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay Rs. 500 on account of the debt: This is a contract.
- (f.) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given: The agreement is a contract not-withstanding the inadequacy of the consideration.
- (g.) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given: The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.

<sup>\*</sup> See now the Indian Limitation Act (IX. of 1908).

Agreement in restraint of marriage void.

26. Every agreement in restraint of the marriage of any person other than a minor\* is void.

Agreement in restraint of trade void.

27. Every agreement, by which any one is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void.

Exception 1.—One who sells the good-will of a business may agree with the buyer to refrain from Saving of agreement not carrying on a similar business within to carry on business of which good-will is sold : specified local limits so long as buyer, or any person deriving title to the good-will from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the husiness

Exception 2.—Patners may, upon or in anticipation of a disof agreement between part solution of the partnership, agree that some or all of them will not carry on a ners prior to dissolution: business similar to that of the partnership within such local limits as are referred to in the last-preceding exception.

Exception 3.—Partners may agree that some one or all of them or during continuance of will not carry on any business other than that of the parmership during the partnership. continuance of the partnership.

28. Every agreement, by which any party thereto is res-Agreements in restraint of tricted absolutely from enforcing his rights under or in respect of any conlegal proceedings void. tract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights. is void to that extent.

Exception 1 - This section shall not render illegal a contract by which two or more persons agree Saving of Contract to refer to arbitration dispute that that any dispute which may arise bemay arise. tween them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

During his or her minority, as to which, see Act IX of 1875. † The words, "restrained from exercising," do not mean an absolute restriction and are intended to apply to a partial restriction—a restriction limited to some particular place, -Per Couch, C.Y., 14 B. L. R. 85.

When such a contract has been made, a suit may be brought for its specific performance; and, if a suit other than for such specific ferformance, or for the recovery of the amount so ownerded, is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.\*

Exception 2.—Nor shall this section render illegal any con-Saving of contract to refer questions that have already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

23. Agreements, the meaning of which is not certain, or Agreements void for uncapable of being made certain, are certainty.

- (a.) A agrees to sell to B a hundred tons of oil.' There is nothing whatever to show what kind of oil was intended: The agreement is void for uncertainty.
- (b) A agrees to sell to B one hundred tons of oil of a specified description known as an article of commerce: There is no uncertainty here to make the agreement void.
- (c.) A, who is a dealer in coccanut-oil only, agrees to sell to B one hundred tons of oil: The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coccanut-oil.
- (d.) A agrees to sell to B all the grain in my granary at Pamnagar. There is no uncertainty here to make the agreement void.
- (e<sub>s</sub>) A agrees to sell to B ' one thousand maunds of rice at a price to be fixed by C e' As the price is capable of being made certain, there is no uncertainty here to make the agreement void.
- (f) A agrees to sell to B 'my white horse for rupees five hundred or rupees one thousand: There is nothing to show which of the two prices was to be given. The agreement is youd.

<sup>\*</sup> In s 28, the italicized clause of Excep I has been repealed by the Specific Relief Act (I. of 1877) throughout British India, except in the scheduled districts, in which that Act is not in force.

<sup>†</sup> See Part V of the Code of Civil Procedure (Act XIV. of 1882): but, see now Act V. of 1908. See also the Indian Companies Act (VI. of 1882) 38, 206 to 211.

80. Agreements by way of wager are void, and no suit shall Agreement by way of he brought for recovering anything wager void.

alleged to he won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

This section shall not be deemed to render unlawful a subs-Exception in favour of certain prizes for horse-racing. cription or contribution, or agreement to subscribe or contribute, made or entered into for or towards any plate, prize, or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any ho serace.\*

Nothing in this section shall be deemed to legalize any transsection 294A of the Indian Penal Code not affected.

Section 294A of the Indian Penal Code not affected.

Section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of section 294A of the Indian Penal Code† apply.

## CHAPTER III.

## OF CONTINGENT CONTRACTS.

31. A 'contingent contract' is a contract to do or not to do "Contingent contract" something if some event collateral to such contract does or does not happen.

#### Illustration.

A contracts to pay B Rs. 10,000 if B's house is burnt: This is a contingent contract.

82. Contingent contracts to do or not to do anything if an Enforcement of contracts uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

#### Illustrations.

(a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.

<sup>\*</sup> C/, the Gaming Act, 1845 (Stat. 8 & 9 Vict., c. 109), s. 18. + Act XLV, of 1860.

- (b.) A makes a contract with B to sell a horse to B at a specified price if C, to whom the horse has been offered, refuses to buy him: The contract cannot be enforced by law unless and until C refuses to buy the horse.
- (c<sub>e</sub>) A contracts to pay B a sum of money when B marries C. C dies without being married to B: The contract becomes void.
- 83. Contingent contracts to do or not to do anything if an uncertain future event does not happening of that event becomes im-

possible, and not before.

## Illustration.

A agrees to pay B a sum of money if a certain ship does not return. This ship is sunk: The contract can be enforced when the ship sinks.

When event on which contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible the future conduct of a when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

## Illustration.

A agrees to pay B a sum of money if B marries C.

C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die, and that C may afterwards marry B.

When contracts become within a fixed time become void if, at the expiration of the time fixed, such event the time fixed, such event becomes impossible.

Contingent contracts to do or not to do anything if a specified when contracts may be enforced which are contingent on specified event not happening within fixed time.

the time fixed has expired, if it becomes certain that such event will not happen.

- (a.) A promises to pay B a sum of money if a certain ship return within a year: The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.
- (b.) A promises to pay B a sum of money if a certain ship does not retern within a year: The contract may be enforced if the ship does not return within the year, or is burnt within the year.
- Agreements contingent on impossible event happens are void, impossible events void. whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

## Illustrations.

- (a.) A agrees to pay B 1,000 rupees if two straight lines should enclose a space: The agreement is void.
- (b.) A agrees to pay B 1,000 rupees if B will marry A's daughter C. C was dead at the time of the agreement: The agreement is void.

## CHAPTER IV.

## OF THE PERFORMANCE OF CONTRACTS.

## Contracts which must be verformed.

37. The parties to a contract must either perform, or offer to Obligation of parties to perform, their respective promises, unless contracts. such perform noe is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance\* unless a contrary intention appears from the contract.

- (a.) A promises to deliver goods to B on a certain day on payment of Rs. 1,000. A dies before that day: A's representatives are bound to deliver the goods to B, and B is bound to pay the Rs. 1,000 to A's representatives
- (6) A promises to paint a picture for B by a certain day at a certain price. A dies before the day: The contract cannot be enforced either by A's representatives or by B

<sup>\*</sup> This probably means "to the extent of the assets received by them as such, and not duly applied."—See Madho Dass v. Radha Mal, 9 Punjab Record 213.

38. Where a promisor has made an offer of performance to Effect of refusal to accept the promisee, and the offer has not been offer of performance. accepted, the promisor is not responsible tor non-performance, not does he thereby lose his rights under the contract.

Every such offer must fulfil the following conditions:-

- (1.) It must be unconditional:
- (2.) It must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do:
- (3.) If the offer is an effer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

## Illustration.

A contracts to deliver to B at his warehouse, on the 1st March 1873, 100 bales of cotton of a particular quality. In order to make an offer of performance with the effect stated in this section, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

39. When a party to a contract has refused to perform, or Effect of refusal of party disabled himself from performing, his to perform promise wholly. promise in its entirety, the promise may put an end to the contract\* unless he has signified, by words or conduct, his acquiescence in its continuance.

- (a.) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night. A wilfully absents herself from the theatre: B is at liberty to put an end to the contract.
- (b.) A, singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two

months, and B engages to pay her at the rate of 100 rupees for each night. On the sixth night. A wilfully absents herself. With the assent of B, A sings on the seventh night: B has signified his acquiescence in the continuance of the contract and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

# By whom Contracts must be performed.

40. It it appears from the nature of the case that it was the Person by whom promise intention of the parties to any contract is to be performed. that any promise contained in it should be performed by the promisor h mself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

- (a.) A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B, or by causing it to be paid to B by another; and, if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.
- (b.) A promises to paint a picture for B: A must perform this promise personally.
- 41. When a promisee accepts performance of the promise from Effect of accepting per- a third person, he cannot afterwards formance from third person. enforce it against the promisor.
- 42. When two or more persons have made a joint promise,

  Devolution of joint liab: then (unless a contrary intention appears
  lities. by the contract) all such persons, during
  their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and, after the death of
  the last survivor, the representatives of all jointly, must fulfil the
  promise.
- 43. When two or more persons make a joint promise, the

  Any one of joint promisers promisee may, in the absence of express
  may be compelled to peragreement to the contrary, compel any
  one "or more" of such joint promisers
  to perform the whole of the promise.

<sup>\*</sup> In s. 43, the words "or more" have been inserted by the Repealing and Amending Act (XII. of 1891).

Each of two or more joint promisors may compel every other

Each promisor may compound joint promisor to contribute equally pel contribution.

with himself to the performance of the promise unless a contrary intention appears from the contract.

If any one of two or more joint promisors makes default in Sharing of loss by default such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation.—Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

- (a.) A, B, and C jointly promise to pay D 3,000 rupees: D may compel either A or B or C to pay him 3,000 rupees.
- (b.) A, B, and C jointly promise to pay D the sum of 3,000 rupees. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one half of his debts: C is entitled to receive 500 rupees from A's estate and 1,250 rupees from B.
- (c.) A, B, and C are under a joint promise to pay D 3,000 rupees. C is unable to pay anything, and A is compelled to pay the whole: A is entitled to receive 1,500 rupees from B.
- (d) A, B, and C are under a joint promise to pay D 3,000 rupees. A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum: They are entitled to recover it from C.
- 44. Where two or more persons have made a joint promise, Effect of release of one a release of one of such joint promisors joint contractor. by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.\*
- 45. When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with

the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.\*

## Illustration.

A, in consideration of 5,000 rupees lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life, and, after the death of C, with the representatives of B and C jointly.

# Time and Place for Performance.

Time for performance of promise where no application is to be made, and no time is specified.

Contract a promisor is to perform his promise without application by the promise, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation.—The question—"What is a reasonable time"—is, in each particular case, a question of fact.

47. When a promise is to be performed on a certain day, and the promisor has undertaken to performance of promise where time is specified, and no application to be made.

of business on such day, and at the place at which the promise ought to be performed.

## Illustration.

A promises to deliver goods at B's warehouse on the 1st January. On that day A brings the goods to B's warehouse, but after the usual hour for closing it, and they are not received: A has not performed his promise.

48. When a promise is to be performed on a certain day,

Application for performance of certain day to be at proper time and place.

The promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place, and within the usual hours of business.

Explanation.—The question—"What is a proper time and place"—is, in each particular case, a question of fact.

<sup>\*</sup> For an exception to s. 45 in case of Government Securities, see the Indian Securities Act (XIII. of 1886), s. 5.

Place for performance of

promise where no applicaplace fixed.

49. When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it it is the duty of the promisor to apply to the promises to appoint a reasonable place for the

performance of the promise, and to perform it at such place.

### Illustration.

A undertakes to deliver a thousand maunds of jute to B on a fixed day : A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver to him at such place.

Performance in manner or at time prescribed or sanctioned by promisee.

50. The performance of any promise may be made in any manner, or at any time, which the promisee prescribes or sanctions.

### Illustrations.

- (a) B owes A 2,000 rupees. A desires B to pay the amount to A's account with C, a banker. B, who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by C. Afterwards, and before A knows of the transfer, C fails: There has been a good payment by B.
- (b.) A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement: This amounts to a payment by A and B, respectively, of the sums which they owed to each other.
- (c.) A owes B 2,000 rupees. B accepts some of A's goods in reduction of the debt: The delivery of the goods operates as a part payment.
- (d.) A desires B, who owes him Rs. 100, to send him a note for Ks. 100 by post: The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.

# Performance of Reciprocal Promises.

Promisor not bound to perform unless reciprocal promisee ready and willing to perform.

51. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

#### Illustrations.

(a.) A and B contract that A shall deliver goods to B to be paid for by B on delivery .

Act IX., 1872 .- 3.

A need not deliver the goods unless B is ready and willing to pay for the goods on delivery.

B need not pay for the goods unless A is ready and willing to deliver them on payment.

(b.) A and B contract that A shall deliver goods to B at a price to be paid by instalments, the first instalment to be paid on delivery:

A need not deliver unless B is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment unless A is ready and wiling to deliver the goods on payment of the first instalment.

52. Where the order in which reciprocal promises are to be Order of performance of performed is expressly fixed by the reciprocal promises. contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

## Illustrations.

(a.) A and B contract that A shall build a house for B at a fixed price: A's promise to build the house must be performed before B' promise to pay for it.

(b<sub>\*</sub>) A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the money: A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.

53. When a contract contains reciprocal promises, and one Liability of party prevents party to the contract prevents the other ing event on which contract from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation\* from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

## Illustration.

A and B contract that B shall execute certain work for A for a thousand rupees. B is ready and willing to execute the work accordingly, but A prevents him from doing so: The contract is voidable at the option of B; and if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

Effect of default as to that that one of them cannot be performed, promise which should be first performed in contract consists.

It is performed cannot be performed cannot be performed in contract consisting of reciprocal promises.

Formed and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

#### Illustrations.

- (a.) A hires B's ship to take in and convey from Calcutta to the Mauritius a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship: A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.
- (b.) A contracts with B to execute certain builders' work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed: A need not execute the work and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.
- (c.) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week: A's promise to deliver need not be performed, and B must make compensation.
- (d.) A promises B to sall him one hundred bales of merchandise to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise: B's promise to pay need not be performed, and A must make compensation.
- Effect of failure to perform at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed. becomes voidable at the option of the promisee if the intention of the parties was that time should be of the essence of the contract.

If it was not the intention of the parties that time should be of Effect of such failure when the essence of the contract, the contract time is not essential. does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the Effect of acceptance of time agreed, the promisee accepts perperformance at time other formance of such promise at any time than that agreed upon. other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed unless, at the time of such acceptance he gives notice to the promisor of his intention to do so \* 56. An agreement to do an act

Agreement to do impossible act.

impossible in itself is void. A contract to do an act which, after the contract is made, becomes impossible,† or, by reason of some event which the promisor could not prevent, unlawful, becomes void when

Contract to do act after-wards becoming impossible or unlawful.

through non-performance of act known to be impossible

or unlawful.

the Act becomes impossible or unlawful.; Compensation for

Where one person has promised to do something which he knew or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make

compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

# Illustrations.

(a.) A agrees with B to discover treasure by magic: The agreement is void.

(b.) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad: The contract becomes void.

(c.) A contracts to marry B, being already married to C, and being forbidden by the law to which be is subject to practise polygamy : A must make compensation to B for the loss caused to her by the non-performance of his promise.

(d.) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares were against the country in which the port is situated: The contract becomes void when war is declared.

(e.) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act: The contract to act on those occasions becomes void.

<sup>\*</sup> Compare ss. 62 and 63, infra.

<sup>+</sup> Otherwise than by the default of the contractor.

But see s. 65, infra. And see the Specific Relief Act (1. of 1877),

Reciprocal promises to do things legal and, also, other things illegal.

Grant Reciprocal promises to do things legal and, also, other things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract; but the second is a void agreement.

### Illustration.

A and B agree that A shall sell B a house for 10,000 rupees, but that, if B uses it as a gambling house, he shall pay A 50,000 rupees for it:

The first set of reciprocal promises, namely, to sell the house, and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that B may use the house as a gambling house, and is a void agreement.

53. In the case of an alternative promise, one branch of which Alternative promise, one is legal and the other illegal, the legal branch being illegal.

### Illustration .

A and B agree that A shall pay B 1,000 rupees, for which B shall afterwards deliver to A either rice or smuggled opium:

This is a valid contract to deliver rice, and a void agreement as to the opium.

## Appropriation of Payments.

59. Where a debtor, owing several distinct debts to one per-Application of payment son, makes a payment to him, either where debt to be discharged with express intimation, or under circumstances implying, that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

- (a.) A owes B, among other debts, 1,000 rupees upon a promissory note, which falls due on the 1st June. He owes B no other debt of that amount. On the 1st June, A pays to B 1,000 rupees: The payment is to be applied to the discharge of the promissory note.
- (b.) A owes B, among other debts, the sum of 567 rupees. B writes to A, and demands payment of this sum. A sends to B 567 rupees: This payment is to be applied to the discharge of the debt of which B had demanded payment.

- Application of payment no other circumstances indicating, to where debt to be discharged which debt the payment is to be applied is not indicated. the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.
- Application of payment ment shall be applied in discharge of the debts\* in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.

# Contracts which need not be performed.

62. If the parties to a contract agree to substitute a new con-Effect of novation, rescission, and alteration of scontract.

tract for it, or to rescind or alter it, the original contract need not be performed.

- (a.) A owes money to B under a contract. It is agreed, between A, B, and C that B shall thenceforth accept C as his debtor instead of A: The old debt of A to B is at an end, and a new debt from C to B has been contracted.
- (b.) A owes B 10,000 rupees. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for 5,000 rupees in place of the debt of 10,000 rupees: This is a new contract, and extinguishes the
- (c.) A owes B 1,000 rupees under a contract. B owes C. 1,000 rupees. B orders A to credit C with 1,000 rupees in his books, but C does not assent to the arrangement: B still owes C 1,000 rupees, and no new contract has been entered into.
- 63. Every promisee may dispense with or remit, wholly or Promisee may dispense in part, the performance of the promise with or remit performance of made to him, or may extend the time for such performance, or may accept, instead of it, any satisfaction which he thinks fit.

Probably the lawful debts referred to in s. 60.

<sup>†</sup> But see s. 135, infra.

- (a.) A promises to paint a picture for B. B afterwards forbids him to do so: A is no longer bound to perform the promise.
- (b.) A owes B 5,000 rupees. A pays to B, and B accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable: The whole debt is discharged.
- (c.) A owes B 5,000 rupees. C pays to B 1,000 rupees, and B accepts them, in satisfaction of his claim on A: This payment is a discharge of the whole claim.\*
- (d.) A owes B, under a contract, a sum of money, the amount of which has not been ascertained. A, without ascertaining the amount, gives to B, and B, in satisfaction thereof, accepts, the sum of 2,000 rupees: This is a discharge of the whole debt, whatever may be its amount.
- (e.) A owes B 2 000 rupees, and is also indeb ted to other creditors. A makes an arrangement with his creditors, including B, to pay them a composition; of eight annas in the rupee upon their respective demands: Payment to B of 1,000 rupees is a discharge of B's demand.
- 64. When a person, at whose option a contract is voidable, Consequences of rescission rescinds it, the other party thereto need of voidable contract. not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received ‡
- Obligation of person who has received advantage under void agreement or contract that becomes void.

  Obligation of person who has received advantage under such agreement or contract that becomes void.

  The person from whom he received it.

#### Illustrations.

- (a.) A pays B 1,000 rupees in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise: The agreement is void, but B must repay A the 1,000 rupees.
- (b.) A contract with B to deliver to him 250 maunds of rice before the first of May. A delivers 130 maunds only before that day, and none after. B retains the 130 maunds after the first of May: He is bound to pay A tor them.

<sup>\*</sup> See s. AI, supra.

<sup>†</sup> The word "composition" has been substituted for the word "compensation" by the Repealing and Amending Act (XII. of 1891).

<sup>1</sup> See s. 75, infra.

- (c.) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre and B, in consequence, rescinds the contract: B must pay A for the five nights on which she had sung.
- (d.) A contracts to sing for B at a concert for 1,000 rupees which are paid in advance. A is too ill to sing: A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing but must refund to B the 1,000 rupees paid in advance.
- 66. The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.\*
- Effect of neglect of promiser reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

A contracts with B to repair B's house.

B neglects or refuses to point out to A the places in which his house requires repair:

A is execused for the non-performance of the contract if it is caused by such neglect or refusal.

## CHAPTER V.

Of CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT.

Claim for necessaries supplied to person incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries, or on his accontracting, or on his accontracting, or on his account.

Series suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

(a.) A supplies B, a lunatic, with necessaries suitable to his condition in life: A is entitled to be reimbursed from B's property.

(b.) A supplies the wife and children of B, a lunatic, with necessaries suitable to their condition in life: A is entitled to be reimbursed from B's property.

Reimbursement of person paying money due by another, in payment of which he is interested.

69. A person, who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

#### Illustration.

B holds lands in Bengal on a lease granted by A, the zamindar. The revenue payable by A to the Govern ment being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of B's lease. B, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from A: A is bound to make good to B the amount so paid.

70. Where a person lawfully does anything for another Obligation of person en joy- person, or delivers anything to him, not ing benefit of non-gratui tous intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect

of, or to restore, the thing so done or delivered.\*

#### Illustrations.

(a.) A, a tradesman, leaves goods at B's house by mistake: B treats the goods as his own: He is bound to pay A for them.

(b.) A saves B's property from fire: A is not entitled to compensation from B if the circum stances show that he intended to act gratuitously.

71. A person who finds goods belonging to another, and takes them into his custody, is subject to Responsibility of finder of the same responsibility as a bailee.† goods.

Liability of person to whom money is paid, or thing delivered, by mistake or under coercion.

72. A person to whom money has been paid, or anything delivered, by mistake, or under coercion, t must repay or return it.

† See ss. 151 and 152, infra. As to definition of "bailee," see s. 148, infra.

I For definition of " coercion," see s. 15, supra.

<sup>\*</sup> As to suits by minors under s. 70 in Presidency Small Cause Courts, see the Presidency Small Cause Courts Act (XV. of 1882). s. 32.

- (a.) A and B jointly owe 100 rupees to C. A alone pays the amoun to C, and B, not knowing this fact, pays 100 rupees over again to C: C is bound to repay the amount to B.
- (b.) A railway company refuses to deliver up certain goods to the consignee except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods: He is entitled to recover so much of the charge as was illegally excessive.

## CHAPTER VI.

# OF THE CONSEQUENCES OF BREACH OF CONTRACT.

73. When a contract has been broken, the party who suffers by such breach is entitled to receive. Compensation for loss or damage caused by breach of from the party who has broken the contract. contract, compensation for any loss or damage caused to him thereby, which naturally arose, in the usual course of things, from such breach, or which the parties knew when they made the contract to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.

When an obligation resembling those created by contract has been incurred, and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party

in default as if such person had contracted to discharge it, and had broken his contract.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedving the inconvenience caused by the non-performance of the contract must he taken into account.

#### Illustrations.

(a) A contracts to sell and deliver 50 maunds of saltpetre to B at a certain price to be paid on delivery A breaks his promise: B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract-price falls short of the price for which B might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

- (b.) A hires B's ship to go to Bombay, and there take on board, on the first of January, a cargo which A is to provide, and to bring it to Calcutta, the freight to be paid when earned. B's ship does not go to Bombay, but A has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself of those opportunities, but is put to trouble and expense in doing so: A is entitled to receive compensation from B in respect of such trouble and expense.
- (c.) A contracts to buy of B, at a stated price, 50 maunds of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to him: B is entitled to receive from A, by way of compensation, the amount, if any, by which the contract-price exceeds that which B can obtain for the rice at the time when A informs B that he will not accept it.
- (d.) A contracts to buy B's ship for 60,000 rupees, but breaks his promise: A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.
- (e.) A, the owner of a boat, contracts with B to take a cargo of jute to Mirzapur for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time which it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls: The measure of the compensation payable to B by A is the difference between the price which B could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course and its market price at the time when it actually arrived.
- (f.) A contracts to repair B's house in a certain manner, and receives payment in advance A repairs the house, but not according to contract: B is entitled to recover from A the costs of making the repairs conform to the contract.
- (g.) A contracts to let his ship to B for a year, from the first of January, for a certain price. Freights raise, and, on the first of January, the hire obtainable for the ship is higher than the contract-price. A breaks his promise: He must pay to B, by way, of compensation, a sum equal to the difference between the contract-price and the price for which B could hire a similar ship for a year on and from the first of January.
- (h.) A contracts to supply B with a certain quantity of shot at a fixed price, being a higher price than that for which A could procure and deliver the iron. B wrongfully refuses to receive the iron: B must pay to A, by way of compensation, the difference between the contract-price of the iron and the sum for which A could have obtained and delivered it.
- (i.) A delivers to B, a common carrier, a machine to be conveyed, without delay to A's mill, informing B that his mill is stopped for want of the machine. B unreasonably delays the delivery of the machine, and A, in consequence, loses a profitable contract with the Government: A is entitled to receive from B, by way of compensation, the average amount of profit which would have been made by the working of the mill during the

time that delivery of it was delayed but not the loss sustained through the loss of the Government contract.

- (j.) A, having contracted with B to supply B with 1,000 tons of iron, at 100 rupees a ton, to be delivered at a stated time, contracts with C for the purchase of 1,000 tons of iron at 80 rupees a ton, telling C that he does so for the purpose of performing his contract with B. C fails to perform his contract with A, who cannot procure other iron, and B, in consequence, rescinds the contract: C must pay to A 20,000 rupees, being the profit which A would have made by the performance of his contract with B.
- (k.) A contracts with B to make and deliver to B, by a fixed day, for a specified price, a certain piece of machinery. A does not deliver the piece of machinery at the time specified, and in consequence of this, B is obliged to procure another at a higher price than that which he was to have paid to A, and is prevented from performing a contract which B had made with a third person at the time of his contract with A (but which had not been then communicated to A), and is compelled to make compensation for breach of that contract: A must pay to B, by way of compensation, the difference between the contract-price of the piece of machinery and the sum paid by B for another, but not the sum paid by B to the third person by way of compensation.
- (L) A, a builder, contracts to erect and finish a house by the first of January in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that before the first of January it falls down, and has to be rebuilt by B, who, in consequence, loses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract: A must make compensation to B for the cost of rebuilding the house, for the rent lost, and for the compensation made to C.
- (m.) A sells certain merchandise to B, warranting it to be of a particular quality, and B, in reliance upon this warranty, sells it to C with a similar warranty. The goods prove to be not according to the warranty and B becomes liable to pay C a sum of money by way of compensation: B is entitled to be reimbursed this sum by A.
- (n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day. B in consequence of not receiving the money on that day is unable to pay his debts, and is totally ruined: A is not liable to make good to B anything except the principal sum he contracted to pay together with interest up to the day of payment.
- (c.) A contracts to deliver so mainds of saltpetre to B on the first of January at a certain price B afterwards, before the first of January, contracts to sell the saltpetre to C at a price higher than the market-price of the first of January. A breaks his promise: In estimating the compensation payable by A to B, the market-price of the first of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.
- (p.) A contracts to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks

his promise, and B, having no cotton is obliged to close his mill; A is not responsible to B for the loss caused to B by the closing of the mill.

- (q) A contracts to sell and deliver to B, on the 1st of January, certain cloth which B intends to manufacture into caps of a particular kind, for which there is no demand except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps: B is entitled to receive from A, by way of compensation, the difference between the contract-price of the cloth and its market-price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.
- (r.) A, a ship-owner contracts with B to convey him from Calcutta to Sydney in A's ship sailing on the first of January, and B pays to A, by way of deposit, one-half of his passage-money. The ship does not sail on the first of January, and B, after being, in consequence, detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney loses a sum of money: A is liable to repay to B his deposit with interest and the expense to which he is put by his detention in Calcutta, and the excess, if any of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which B lost by arriving in Sydney too late.
- 74\* When a contract has been broken, if a sum is named Compensation for breach in the contract as the amount to be of contract where penalty paid in case of such breach, or if the stipulated for.

  way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.—When any person enters into any bail-bond, recognisance, or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Government of India, or of any Local Government, gives any bond for the performance of any-public duty or act in which the public are interested.

<sup>\*</sup>Para. 1 of s. 74 and the Explanation following it have been substituted for the paragraph originally enacted. The difference between the old and the new paragraph is shown by the italicized words, which are newly inserted in the repealed paragraph. The Explanation which follows para. 1 is entirely new. See the Indian Contract Act Amendment Act (VI. of 1899), s. 4 (1).

he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein

Explanation .- A person who enters into a contract with Government does not necessarily thereby undertake any public duty or promise to do an act in which the public are interested.

## Illustrations.

- (a.) A contracts with B to pay B Rs. 1,000 if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day: B is entitled to recover from A such compensation, not exceeding Rs. 1,000, as the Court considers reasonable.
- (b.) A contracts with B that, if A practises as a surgeon within Calcutta, he will pay B Rs. 5.000 A practises as a surgeon in Calcutta: B is entitled to such compensation, not exceeding Rs. 5,000, as the Court considers reasonable.
- (c.) A gives a recognisance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognisance: He is liable to pay the whole penalty.
- (d.) A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent. at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent. from the date of default: This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.
- (e.) A, who owes money to B, a money-lender, undertakes to repay him by delivering to him to maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds: This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.
- (f.)\* A undertakes to repay B a loan of Rs. 1,000 by five equal monthly instalments, with a stipulation that, in default of payment of any instalment, the whole shall become due: This stigulation is not by way of penalty, and the contract may be enforced according to its terms.
- (g) A borrows Rs. 100 from B, and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due: This is a stipulation by way of penalty.
- Party rightfully rescinding contract entitled to compensation.

75. A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the centract.

<sup>\*</sup> Illustrations (d), (e), (f), and (g) have been added to the original ones to 5. 74 by the Indian Contract Act Amendment Act (VI. of 1899), s. 4 (2).

A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract: B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

## CHAPTER VII.

### SALE OF GOODS.

## When Property in Goods sold passes.

'Goods' defined.

76. In this Chapter, the word goods means and includes every kind of moveable property.

77. 'Sale' is the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the sellor to the buyer.

Sale how effected.

78. Sale is effected by offer and acceptance of ascertained goods for a price,

or of a price for ascertained goods,

together with payment of the price or delivery of the goods; or with tender, part-payment, earnest, or part-delivery; or with an agreement, express or implied, that the payment or delivery, or both, shall be postponed.

Where there is a contract for the sale of ascertained goods; the property in the goods sold passes to the buyer when the whole or part of the price, or when the earnest, is paid, or when the whole or part of the goods is delivered.\*

If the parties agree expressly or by implication, that the payment or delivery, or both, shall be postponed, the property passes as soon as the proposal for sate is accepted.

#### Illustrations.

(a.) B offers to buy A's horse for 500 rupees. A accepts B's offer, and delivers the horse to B: The horse becomes B's property on delivery.

<sup>\*</sup> That is, when the whole is delivered, or when part is delivered in progress of delivery of the whole.—See s. 92, infra.

- (b.) A sends goods to B with the request that he will buy them at a stated price if he approves of them, or return them if he does not approve of them. B retains the goods, and informs A that he approves of them: The goods become B's when B retains them.
- (c.) B offers A, for his horse, 1,000 rupees, the horse to be delivered to B on a stated day, and the price to be paid on another stated day. A accepts the offer: The horse becomes B's as soon as the proposal is accepted.
- (d.) B offers A, for his horse, 1,000 rupees on a month's credit accepts the offer: The horse becomes B's as soon as the offer is accepted.
- (e.) B, on the first January, offers to A, for a quantity of rice, 2,000 rupees, to be paid on the 1st Mach following, the rice not to be taken away till paid for. A accepts the offer: The rice becomes B's as soon asthe offer is accepted.
- Transfer of ownership of thing sold, which has yet to be ascertained, made, or finished.

79. Where there is a contract for the sale of a thing which has yet to be ascertained, made, or finished,\* the ownership of the thing is not transferred to the buyer until it is ascenained, made, or finished.

### Illus tration.

B orders A, a barge-builder, to make him a barge. The price is not made payable by instalments. While the barge is building, B pays to A money from time to time on account of the price: The ownership of the barge does not pass to B until it is finished.

Completion of sale of goods which the seller is to put into state in which buyer is to take them.

80. Where, by a contract for the sale of goods, the seller is to do anything to them for the purpose of putting them into a state in which the buyer is to take them, the sale is not complete until such thing has been done.

## Illustration.

A, a ship-builder, contracts to sell to B for a stated price a vessel which is lying in A's yard, the vessel to be rigged and fitted for a voyage, and the price to be paid on delivery: Under the contract, the property in the vessel does not pass to B until the vessel has been rigged, fitted up, and delivered.

Completion of sale of goods when seller has to do anything thereto in order to ascertain price.

81. Where anything remains to be done to the goods by the seller for the purpose of ascertaining the amount of the price, the sale is not complete until this has been done.

- (a.) A, the owner of a stack of bark, contracts to sell it to B, weigh and deliver it, at 100 rupees per ton. B agrees to take and pay for it on a certain day. Part is weighed and delivered to B: The ownership of the residue is not transferred to B until it has been weighed pursuant to the contract.
- (b.) A contracts to sell a heap of clay to B at a certain price per ton, B is, by the contract to load the clay in his own carts, and to weigh each load at a certain weighing machine, which his carts must pass on their way from A's grounds to B's place of deposit: Here, nothing more remains to be done by the seller; the sale is complete, and the ownership of the heap of clay is transferred at once.
- 82. Where the goods are not ascertained at the time of Completion of sale when goods are unascertained at necessary to the completion of the sale that the goods shall be ascertained.\*

### Illustration.

A agrees to sell to B 20 tons of oil in A's cisterns. A's cisterns contain more than 20 tons of oil: No portion of the oil has become the property of B.

Ascertainment of goods by making the agreement for sale, but subsequent appropriation. goods answering the description in the agreement are subsequently appropriated by one party for the purpose of the agreement, and that appropriation is assented to by the other, the goods have been ascertained, and the sale is complete.

#### Illustration.

A, having a quantity of sugar in bulk more than sufficient to fill 20 hogsheads, contracts to sell B 20 hogsheads of it. After the contract, A fills 20 hogsheads with the surgar, and gives notice to B that the hogsheads are ready, and requires him to take them away. B says he will take them as soon as he can: By this appropriation by A and assent by B, the sugar becomes the property of B.

Ascertainment of goods by making the contract of sale, and, by the seller's selection. terms of the contract, the seller is to do an act with reference to the goods which cannot be done until they are appropriated to the buyer, the seller has a right to select any

goods answering to the contract, and, by his doing so, the goods are assertained.

## Illustration.

B agrees with A to purchase of him at a stated price, to be paid on a fixed day, 50 maunds of rice out of a larger quantity in A's granary. It is agreed that B shall send sacks for the rice, and that A shall put the rice into them. B does so, and A puts 50 maunds of rice into the sacks: The goods have been ascertained.

Transfer of ownership of movesble property when sold together with immoveable.

Transfer of ownership of able and moveable property combined, the cwnership of the moveable property does not pass before the transfer of the immoveable property.

## Illustration.

A agree, with B for the sale of a house and furniture: The ownership of the furniture does not pass to B until the house is conveyed to B.

Buyer to bear loss after goods have become his property.

86. When goods have become the property of the buyer, he must bear any loss arising from their destruction or injury.

## Illustrations.

- (a.) B offers and A accepts 100 rupees for a stack of fire-wood standing on A's premises the fire-wood to be allowed to remain on A's premises till a certain day, and not to be taken away till paid for. Before payment, and while the fire-wood is on A's premises, it is accidentally destroyed by fire: B must bear the loss.
- (b.) A bids 1,000 rupees for a picture at a sale by auction. After the bid, it is injured by an accident. If the accident happens before the hammer falls, the loss talls on the seller; if afterwards, on A.
- Transfer of ownership in existence, the ownership of the goods of goods agreed to be sold while non-existent.

  Transfer of ownership in existence, the ownership of the goods may be transferred by acts done after the goods are produced in pursuance of the contract by the seller, or by the buyer with the seller's assent.

#### Illustrations.

(a.) A contracts to sell to B for a stated price, all the indigo which shall be produced at A's factory during the ensuing year. A, when the indigo has been manufactured, gives B an acknowledgment that he

holds the indigo at his disposal: The ownership of the indigo vests in B from the date of the acknowledgment.

- (b) A, for a stated price, contracts that B may take and sell any crops that shall be grown on A's land in succession to the crops thea standing. Under this contract, B with the assent of A, takes possession of some crops grown in succession to the crops standing at the time of the contract: The ownership of the crops, when taken possession of, vests in B.
- (c.) A, for a stated price, contracts that B may take and sell any crops that shall be grown on his land in succession to the crops then standing. Under this contract, B applies to A for possession of some crops grown in succession to the crops which were standing at the time of the contract. A refuses to give possession: The ownership of the crops has not passed to B, though A may commit a breach of contract in refusing to give possession.
- Contract to sell and delivered to sale of goods to be delivered at a future day is binding, though the goods are not in the possession of the seller at the time of making the contract, and though, at that time, he has no reasonable expectation of acquiring them otherwise than by purchase.

## Illustration.

A contracts, on the first January, to sell B 50 shares in the East Indian Railway Company, to be delivered and paid for on the first March of the same year. A, at the time of making the contract, is not in possession of any shares: The contract is valid.

89. Where the price of goods sold is not fixed by the con-Determination of price not tract of sale, the buyer is bound to fixed by contract. pay the seller such a price as the Court considers reasonable.

## Illustration.

B, living in Patna, orders of A, a coach-builder at Calcutta, a carriage of a particular description. Nothing is said by either as to the price. The order having been executed, and the price being in dispute between the buyer and the seller, the Court must decide what price it considers reasonable.

# Delivery.

QO. Delivery of goods sold may be made by doing anything which has the effect of putting them in the possession of the buyer, or of any person authorised to hold them on his behalf.

- (a.) A sells to B a horse, and causes or permits it to be removed from A's stable to B's: The removal to B's stable is a delivery.
- (b<sub>e</sub>) B in England orders 100 bales of cotton from A, a merchant of Bombay, and sends his own ship to Bombay for the cotton: The putting the cotton on board the ship is a delivery to B.
- (c.) A sells to B certain specific goods which are locked up in a godown. A gives B the key of the godown in order that he may get the goods: This is delivery.
- (d.) A sells to B five specific casks of oil. The oil is in the warehouse of A. B sells the five casks to C. A receives warehouse-rent for them from C: This amounts to a delivery of the oil to C, as it shows an assent on the part of A to hold the goods as warehousemen of C.
- (a.) A sells to B 50 maunds of rice in the possession of C, a ware-houseman. A gives B an order to C to transfer the rice to B, and C assents to such order, and transfers the rice in his books to B: This is a delivery.
- (f.) A agrees to sell B five tons of oil, at 1,000 rupees per ton, to be paid for at the time of delivery. A gives to C, a wharfinger at whose wharf he had twenty tons of the oil, an order to transfer five of them into the name of B. C makes the transfer in his bocks and gives A's clerk a notice of the transfer for B. A's clerk takes the transfer notice to B, and offers to give it to him on payment of the price of the oil. B refuses to pay: There has been no delivery to B, as B never assented to make C his agent to hold for him the five tons selected by A.
- 91. A delivery to a wharfinger or carrier of the goods sold has

  Effect of delivery to wharfinger or carrier.

  the same effect as a delivery to the buyer,
  but does not render the buyer liable for
  the price of goods which do not reach him unless the delivery is
  so made as to enable him to hold the wharfinger or carrier responsible for the safe custody or delivery of the goods.

- B, at Agra, orders of A, who lives at Calcutta, three casks of oil to be sent to him by railway. A takes three casks of oil directed to B to the railway station, and leaves them there without conforming to the rules which must be complied with in order to render the Railway Company responsible for their safety. The goods do not reach B: There has not been a sufficient delivery to charge B in a suit for the price.
- **92.** A delivery of part of goods, in progress of the delivery of the whole, has the same effect for the purpose of passing the property in such goods as a delivery of the whole; but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.

- (a.) A ship arrives in a harbour laden with a cargo consigned to A<sub>g</sub> the buyer of the cargo. The captain begins to discharge it, and delivers over part of the goods to A in progress of the delivery of the whole: This is a delivery of the cargo to A for the purpose of passing the property in the cargo.
- (b.) A sells to B a stack of firewood, to be paid for by B on delivery. After the sale, B applies for and obtains from A leave to take away some of the firewood: This has not the legal effect of delivery of the whole.
- (c.) A sells 50 maunds of rice to B. The rice remains in A's warehouse. After the sale, B sells to C 10 maunds of the rice, and A, at B's desire, sends the 10 maunds to C. This has not the legal effect of a delivery of the whole.
- 93. In the absence of any special promise, the seller of Seller not bound to deliver them ver until buyer applies for delivery.\*
- 94. In the absence of any special promise as to delivery, goods sold are to be delivered at the place at which they are at the time of the sale; and goods contracted to be sold are to be delivered at the place at which they are at the time of the contract for sale, or if not then in existence, at the place at which they are produced.

## Seller's Lien.

- 95. Unless a contrary intention appears by the contract, a seller has a lient on sold goods as long as they remain in his possession, and the price or any part of it remains unpaid.
- 26. Where, by the contract, the payment is to be made at a future day, but no time is fixed for the made at a future day, but no time fixed for delivery. Item, and the buyer is entitled to a present delivery of the goods without payment. But, if the buyer becomes insolvent before delivery of the goods, or, if the time appointed for payment arrives before the delivery of the goods, the seller may retain the goods for the price.

\*\*Insolvency "defined. A person is insolvent who has ceased to pay his debts in the usual course of business, or who is incapable of paying them.

## Illustration.

A sells to B a quantity of sugar in A's warehouse. It is agreed that three months' credit shall be given. B allows the sugar to remain in A's warehouse. Before the expiry of the three months, B becomes insolvent. A may retain the goods for the price.

Seller's lien where payment to be made at to be made at to be made at future day, and the buyer allows goods to remain in the possession of the seller until that day, and does not then pay for them, the seller may retain the goods for the price.

## Illustration.

A sells to B a quantity of sugar in A's warehouse. It is agreed that three months' credit shall be given. B allows the sugar to remain in A's warehouse till the expiry of the three months, and then does not pay for them: A may retain the goods for the price.

98. A seller, in possession of goods sold, may retain them Seller's lien against sub. for the price against any subsequen sequent buyer.

buyer unless the seller has recognized the title of the subsequent buyer.

# Stoppage in Transit.

- 99. A seller who has parted with the possession of the Power of seller to stop in goods, and has not received the whole price, may, if the buyer becomes insolvent, step the goods while they are in transit to the buyer.
- 100. Goods are to be deemed in transit while they are in when goods are to be the possession of the carrier, or lodged deemed in transit.

  at any place in the course of transmission to the buyer, and are not yet come into the possession of the buyer or any person on his behalf, otherwise than as being in possession of the carrier, or as being so lodged.

## Illustrations.

(a.) B, living at Madras, orders goods of A at Patna, and directs that they shall be sent to Madras. The goods are sent to Calcutta, and there

delivered to C, a wharfinger, to be forwarded to Madras: The goods, while they are in the possession of C, are in transit.

- (b) B, at Delhi, orders goods of A at Calcutta. A consigns and forwards the goods to B at Delhi. On arrival there, they are taken to the warehouse of B, and left there. B refuses to receive them, and immediately afterwards stops payment: The goods are in transit.
- (c.) B, who lives at Puna, orders goods of A at Bombay. A sends them to Puna by C, a carrier appointed by B. The goods arrive at Puna, and are placed by C, at B's request, in C's warehouse for B: The goods are no longer in transit.
- (d.) B, a merchant of London, orders too bales of cotton of A, a merchant at Bombay. B sends his own ship to Bombay for the cotton: The transit is at an end when the cotton is delivered on board the ship.
- (e) B, a merchant of Lordon, orders too bales of cotton of A, a merchant at Bombay. B sends his own ship to Bombay for the cotton. A delivers the cotton on board the ship, and takes bills of lading from the master, making the cotton deliverable to A's order or assigns. The cotton arrives at London, but, before coming into B's possession, B becomes insolvent. The cotton has not been paid for: A may stop the cotton.
- Continuance of right of cases her inafer mentioned, cease on stoppage.

  the buyer's re-selling the goods while in transit, and receiving the price, but continues until the goods have been delivered to the second buyer, or to some person on his behalf.
- Cessation of right on assignment, by buyer, of bill cument showing title to the goods,\*
  of lading.

  cument showing title to the goods,\*
  assigns it, while the goods are in transit,
  to a second buyer, who is acting in good faith, and who gives valuable consideration for them.

- (a.) A sells and consigns certain goods to B, and sends him the bill of lading. A being still unpaid. B becomes insolvent, and, while the goods are in transit assigns the bill of lading for cash to C, who is not aware of his insolvency: A cannot stop the goods in transit.
- (b.) A sells and consigns certain goods to B. A being still unpaid. B becomes insolvent, and, while the goods are still in transit, a-signs the bill of lading for cash to C, who knows that B is insolvent: The assignment not being in good faith, A may still stop the goods in transit.

<sup>\*</sup> See s. 108, Excep. 1, infra.

Stoppage where bill of lad- any goods is assigned by the buyer of ing is pledged to secure such goods by way of pledge to secure specific advance. an advance made specifically upon it in good faith, the seller cannot, except on payment or tender to the pledgee of the advance so made, stop the goods in transit.

## Illustrations.

- (a.) A sells and consigns goods to B of the value of 12,000 rupees. B assigns the bill of lading for these goods to C to secure a specific advance of 5,000 rupees made to him upon the bill of lading by C. B becomes insolvent, being indebted to C to the amount of 9,000 rupees: A is not entitled to stop the goods except on payment or tender to C of 5,000 rupees.
- (b.) A sells and consigns goods to B of the value of 12,000 rupees. B assigns the bill of lading for these goods to C to secure the sum of 5,000 rupees due from him to C upon a general balance of account. B becomes insoivent: A is entitled to stop the goods in transit without payment or tender to C of the 5,000 rupees.
- 104. The seller may effect stoppage in transit, either by Stoppage how effected. taking actual possession of the goods, or by giving notice of his claim to the carrier or other depository in whose possession they are.
- 105. Such notice may be given, either to the person who has the immediate possession of the goods, or to the principal whose servant has possession. In the latter case, the notice must be given at such a time, and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent a delivery to the buyer.
- 106. Stoppage in transit entitles the seller to hold the goods stopped until the price of the whole of the goods sold is paid.

## Illustration.

A sells to B 100 bales of cotton; 60 bales having come into B's possession, and 40 being still in transit. B becomes insolvent, and A, being still unpaid, stops the 40 bales in transit: A is entitled to hold the 40 bales until the price of the 100 bales is paid.

## Re-sale.

107. Where the buyer of goods fails to perform his part of Re-sale on buyer's failure the contract, either by not taking the goods sold to him, or by not paying for

them, the seller, having a lien on the goods, or having stopped them in transit, may after giving notice to the buyer of his intention to do so, re-sell them after the lapse of a reasonable time, and the buyer must bear any loss, but is not entitled to any profit, which may occur on such re-sale.

### Title.

108. No seller can give to the buyer of goods a better title

Title conveyed by seller of to those goods than he has himself,
goods to buyer.

except in the following cases:—

Exception 1.—When any person is, by the consent of the owner, in possession of any goods, or of any bill of lading, dockwarrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or other document showing title to goods, he may transfer the ownership of the goods, of which he is so in possession, or to which such documents relate, to any other person, and give such person a good title thereto, notwithstanding any instructions of the owner to the contrary:\* Provided that the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods or documents has no right to sell the goods.

Exception 2.—If one of several joint owners of goods has the sole possession of them by the permission of the co-owners, the ownership of the goods is transferred to any person who buys them of such joint owner in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods has no right to sell them.

Exception 3.—When a person has obtained possession of goods under a contract voidable at the option of the other party thereto, the ownership of the goods is transferred to a third person, who, before the contract is rescinded, buys them in good faith of the person in possession, unless the circumstances which render the contract voidable amounted to an offence committed by the person in possession or those whom he represents.

In this case the original seller is entitled to compensation from the original purchaser for any loss which the seller may have sustained by being prevented from rescinding the contract.

<sup>\*</sup> It has been held that this exception does not apply 'where there is only a qualified possession, such as a hirer of goods has, or where the possession is for a specific purpose.'—Greenwood v. Holquette, 12 B. L. R. 46

- (a.) A buys from B, in good faith, a cow which B had stolen from C: The property in the cow is not transferred to A.
- (b.) A, a merchant, entrusts B, his agent, with a bill of lading relating to certain goods, and instructs B not to sell the goods for less than a certain price, and not to give credit to D. B sells the goods to D for less than that price, and gives D three months' credit: The property in the goods passes to D.
- (c.) A sells to B goods of which he has the bill of lading but the bill of lading is made out for delivery of the goods to C, and it has not been endorsed by C: The property is not transferred to B.
- (d.) A, B, and C are joint Hindu brothers, who own certain cattle in common. A is left by B and C in possession of a cow, which he sells to D. D purchases bona fide: The property in the cow is transferred to D.
- (e.) A, by a misrepresentation not amounting to cheating, induces B to sell and deliver to him a horse. A sells the horse to C before B has rescinded the contract: The property in the horse is transferred to C; and B is entitled to compensation from A for any loss which B has sustained by being prevented from rescinding the contract.
- (f.) A compels B by wrongful intimidation, or induces him by cheating or forgery, to sell him a horse and, before B rescinds the contract sells the horse to C: The property is not transferred to C.

## Warranty.

Seller's responsibility for reason of the invalidity of the seller's badness of title.

title, deprived of the thing sold, the seller is responsible to the buyer or the person claiming under him for loss caused thereby unless a contrary intention appears by the contract.

Establishment of implied warranty of goodness or quality.

110. An implied warranty of goodness or quality may be established by the custom of any particular trade.

Warranty of soundness implied on sale of provisions.

111. On the sale of provisions, there is an implied warranty that they are sound.

112. On the sale of goods by sample, there is an implied warranty that the bulk is equal in quality on sale of goods by sample. to the sample.\*

Warranty implied where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination, although the buyer may have bought them by sample or after inspection of the bulk.

Explanation—But, if the contract specifically states that the goods, though sold as of a certain denomination, are not warranted to be of that denomination, there is no implied warranty.

## Illustrations.

- (a.) A, at Calcutta sells to B twelve bags of "waste silk" then on its way from Mushidabad to Calcutta: There is an implied warranty by A that the silk shall be such as is known in the market under the denomination of "waste silk"
- (b.) A buys, by sample, and after having inspected the bulk, 100 bales of "Fair Bengal" cotton. The cotton proves not to be such as is known in the market as "Fair Bengal:" There is a breach of warranty.
- Warranty where goods are for which goods of the denomination dered for a specified purpose. The denomination dered for a specified purpose, mentioned in the order are usually sold, there is an implied warranty by the seller that the goods supplied are fit for that purpose.\*

## Illustration.

B orders of A, a copper-manufacturer, copper for sheathing a vessel. A, on this order, supplies copper: There is an implied warranty that the copper is fit for sheathing a vessel.

Warranty on sale of article of well-known ascertained kind.

115. Upon the sale of an article of a well-known ascertained kind, there is no implied warranty of its fitness for any particular purpose.

## Illustration.

B writes to A, the owner of a patent invention for cleaning cotton—
"Send me your patent cotton cleaning machine to clean the cotton at my
factory." A sends the machine according to order: There is an implied
warranty by A that it is the article known as A's patent cotton-cleaning
machine, but none that it is fit for the particular purpose of cleaning the
cotton at B's factory.

116. In the absence of fraud, and of any express warranty of
Seller when not responsible quality, the seller of an article which
tor latest defects. quality, the seller of an article which it
was sold is not responsible for a latent defect in it.

60

### Illustration.

A sells to B a horse. It turns out that the horse had, at the time of the sale, a defect of which A was unaware: As is not responsible for this.

Buyer's right on breach of delivered and accepted, and the warwarranty. ranty is broken, the sale is not thereby
rendered voidable, but the buyer is entitled to compensation from
the seller for loss caused by the breach of warranty.

### Illustration.

A sells and delivers to B a horse warranted sound. The horse proves to have been unsound at the time of sale: The sale is not thereby rendered voidable, but B is entitled to compensation from A for loss caused by the unsoundness.

118. Where there has been a contract with a warranty for the sale of goods which, at the time of the contract, were not ascertained or not in existence, and the warrant is broken, the buyer may accept the goods, or refuse to accept the goods when tendered.

or keep the goods for a time reasonably sufficient for examining and trying them, and then refuse to accept them: Provided that, during such time, he exercises no other act of ownership over them than is necessary for the purpose of examination and trial.

In any case, the buyer is entitled to compensation from the seller for any loss caused by the breach of warranty; but, if he accepts the goods, and intends to claim compensation, he must give notice of his intention to do so within a reasonable time after discovering the breach of the warranty.

- (a.) A agrees to sell and, without application on B's part, deliver to B soo bales of unascertained cotton by sample. Cotton not in accordance with sample is delivered to B: B may return it if he has not kept it longer than a reasonable time for the purpose of examination.
- (b.) B agrees to buy of A twenty-five sacks of flour by sample. The flour is delivered to B, who pays the price. B, upon examination, finds it

not equal to sample. B afterwards us es two sacks, and sells one: He cannot now rescind the contract and rec over the price; but he is entitled to compensation from A for any loss caused by the breach of warranty.

(c.) B makes two pairs of shoes for A by A's order. When the shoes are delivered, they do not fit A. A keeps both pairs for a day. He wears one pair for a short time in the house, and takes a long walk out of doors in the other pair: He may refuse to accept the first pair, but not the second. But he may recover compensation for any loss sustained by the defect of the second pair.

## Miscellaneous.

When buyer may refuse to accept if goods ordered.

When buyer may refuse to accept if goods not ordered are sent with goods ordered.

With goods ordered, the buyer may recates to accept any of the goods so sent if there is risk or trouble in separating goods not ordered.

## Illustration.

A orders of B specific articles of china. B sends these articles to A in a hamper with other articles of china which had not been ordered: A may

- 120. If a buyer wrongfully refuses to accept the goods sold Effect of wrongful refusal to him, this amounts to a breach of the contract of sale.
- Right of seller as to rescission on failure of buyer to pay price at time fixed.

  Right of seller as to rescission on failure of buyer to pay price at time fixed.

  Price at the time fixed unless it was stipulated by the contract that he should be so entitled.
- 122. Where goods are sold by auction, there is a distinct
  Sale and transfer of lots and separate sale of the goods in each
  sold by auction. lot, by which the ownership thereof is
  transferred as each lot is kn ocked down.
- 123. It, at a sale by auction, the seller makes use of pre-Effect of use, by seller, of tended biddings to raise the price, the price. the sale is voidable at the option of the buyer.

## CHAPTER VIII.

## OF INDEMNITY AND GUARANTEE.

124. A contract by which one party promises to save the "Contract of indemnity" other from loss caused to him by the defined. conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity."

### Illustration.

A contracts to idemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees: This is a contract of idemnity.

125. The promisee in a contract of indemnity, acting within Right of indemnity-holder the scope of his authority, is entitled to recover from the promisor—

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify

applies;

- (2) all costs which he may be compelled to pay in any such suit if in bringing or defending it, he did not contravene the orders of the promisor and acted as it would have been prudent for him to act in the absence of any contract of idemnity, or if the promisor authorised him to bring or defend the suit;
- (3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.
- 126. A "contract of guarantee" is a contract to perform the "Contract of guarantee," promise, or discharge the liability, of a "surety," "principal debtor," and "creditor." person in case of his default. The person who gives the guarantee is called the "surety;" the person in respect of whose default the guarantee is given is called the "principal debtor;" and the person to whom the guarantee is given is called the "creditor." A guarantee may be either oral or written.
- 127. Anything done, or any promise made, for the benefit of Consideration for guarantee.

  Consideration to the surety for giving the guarantee.

- (a.) B requests A to sell and deliver to him goods on credit. A agrees to do so provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.
- (b.) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that, it be does so C will pay for them in default of payment by B. A agrees to forbear as, requested: This is a sufficient consideration for C's promise.
- (c.) A sells and delivers goods to B. C afterwards without consideration, agrees to pay for them in default of B: The agreement is void.
  - 128. The liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract.

## Illustration.

A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable, not only for the amount of the bill, but also for any interest and charges which may have become

"Continuing guarantee."

129. A guarantee which extends to a series of transactions is called a "continuing guarantee."

- (a) A, in consideration that B will employ C in collecting the rents of B's zemindari, promises B to be responsible, to the amount of 5,000 rupees, for the due collection and payment by C of those rents: This is a continuing guarantee.
- (b.) A guarantees payment to B, a tea dealer, to the amount of £100, for any tea he may, from time to time, supply to C. B supplies C with tea to above the value of £100; and C pays B for it. Afterwards B supplies C with tea to the value of £200. C fails to pay: The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of £100.
- (c.) A guarantees payment to B of the price of five sacks of flour to be delivered by B to C, and to be paid for in a month. B delivers five sacks to C. C pays for them. Afterwards B delivers four sacks to C, which C does not pay for: The guarantee given by A was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.
- 180. A continuing guarantee may at any time the revoked by the surety, as to future transactions, by notice to the creditor.

(a) A, in consideration of B's discounting, at A's request, bills of exchange for C, guarantees to B for twelve months, the due payment of all such bills to the extent of 5,000 rupees. B discounts bills for C to the extent of 2,000 rupees. Afterwards, at the end of three months, A revokes the guarantee: This revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for the 2,000 rupees on default of C.

(b.) A guarantees to B, to the extent of 10,000 rupees, that C shall pay all the bills that B shall draw upon him. B draws upon C. C accepts the bill. A gives notice of revocation. C dishonours the bill at maturity: A is liable upon his guarantee.

131. The death of the surety operates, in the absence of any Revocation of continuing contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

Liability of two persons, primarily liable, not affected by arrangement between them that one shall be surethem that one shall be surethem that one shall be surethem shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

#### Mustration.

A and B make a joint and several promissory note to C. A makes it, in fact, as surety for B, and C knows this at the time when the note is made: The fact, that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note.

188. Any variance made without the surety's consent in the Discharge of surety by terms of the contract between the prinvariance in terms of contract. cipal and the creditor discharges the surety as to transactions subsequent to the variance.

#### Illustrations.

(a.) A becomes surety to C for B's conduct as a manager in C's bank. Afterwards, B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdraft. B allows a customer to overdraw, and the Bank loses a sum of money: A is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

- (b.) A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself: A is discharged by the change from future liability under his guarantee, though the misconduct of B is in respect of a duty not affected by the later Act.
- (c.) C agrees to appoint B as his clerk to sell goods at a yearly salary upon A's becoming surety to C for B's duly accounting for moneys received by him as such clerk. Afterwards, without A's knowledge or consent, C and B agree that B should be paid by a commission on the goods sold by him, and not by a fixed salary: A is not liable for subsequent misconduct of B.
- (d.) A gives to C a continuing guarantee to the extent of 3,000 rupees for any oil supplied by C to B on credit. Afterwards B becomes embarrassed, and without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready money, and that the payments shall be applied to the then existing debts between B and C: A is not liable on his guarantee for any goods supplied after this new arrangement.
- (e.) C contracts to lend B 5,000 rupees on the first March. A guarantees repayment. C pays the 5,000 rupees to B on the first January: A is discharged from his liability, as the contract has been varied, in a much as C might sue B for the money before the first of March.
- 134. The surety is discharged by any contract between the Discharge of surety by creditor and the principal debtor, by release or discharge of principal debtor. which the principal debtor is released; or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.\*

- (a.) A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embarrassed, and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands: Here B is released from his debt by the contract with C, and A is discharged from his suretyship.
- (b) A contracts with B to grow a crop of indigo on A's land, and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation of A's land, and thereby prevents him from raising the indigo: C is no longer liable on his guarantee.
- (c.) A contracts with B for a fixed price to build a house for B within a stipulated time, B supplying the necessary timber. C guarantees A's

<sup>\*</sup> See ss. 39, 53, 54, 55, 62, 63, 67, 118, and 120, supra.

performance of the contract. B omits to supply the timber: C is discharged from his suretyship.

135. A contract between the creditor and the principal debtor, by which the creditor makes a

Discharge of surety when or editor compounds with, gi ves time to, or agrees not to tue, principal debtor.

principal debtor.

composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

Surety not discharged when agreement made with third person to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

## Illustration.

C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B: A is not discharged.

137. Mere forbearance on the part of the creditor to sue the Creditor's forbearance to principal debtor, or to enforce any other sue does not discharge surety. remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

## Illustration.

B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable: A is not discharged from his suretyship.

Release of one co-surety does not discharge others. from his responsibility to the other sureties.\*

Discharge of surety by creditor's act or omission impairing surety's eventual remedy.

189. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

- (a.) B contracts to build a ship for C for a given sum to be paid by instalments as the work reaches certain stages. A becomes surety to C for B's due performance of the contract. C, without the knowledge of A, prepays to B the last two instalments: A is discharged by the prepayment.\*
- (b.) Cleads money to B on the security of a joint and several promissory note made in C's favour by B and by A as surety for B, together with a bill of sale of B's furniture, which gives power to C to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, C sells the furniture, but, owing to his misconduct and wilful negligence, only a small price is realized: A is discharged from liability on the note.
- (c) A puts M as apprentice to B, and gives a guarantee to B for M's fidelity. B promises on his part that he will, at least once a month, see M make up the cash. B omits to see this done as promised, and M embezzles: A is not liable to B on his guarantee.
- Rights of surety on pay- of the principal debtor to perform a ment or performance. guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.
- 141. A surety is entitled to the benefit of every security which Surety's right to benefit of the creditor has against the principal creditor's securities. debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

- (a.) C advances to B, his tenant, 2,000 rupees on the guarantee of A. C has also a further security for the 2,000 rupees by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent, and C sues A on his guarantee: A is discharged from liability to the amount of the value of the furniture.
- (b.) C, a creditor, whose advance to B is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution: A is discharged.

<sup>\*</sup> See 9. 133, supra.

<sup>†</sup> For example, the right to stop in transit.

<sup>‡</sup> See s. 139, supra.

- (c.) A, as surety for B, makes a bond jointly with B, to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt. Subsequently, C gives up the further security: A is not discharged.
- 142. Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.
- 148. Any guarantee which the creditor has obtained by Guarantee obtained by means of keeping silence as to a concealment invalid.

  material circumstance is invalid.

- (a.) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A, in consequence, calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default: The guarantee is invalid.
- (b.) A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market-price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A: A is not liable as a surety.
- 144. Where a person gives guarantee upon a contract that Guarantee on contract that the creditor shall not act upon it until creditor shall not act on it another person has joined in it as co-surety joins.

  surety, the guarantee is not valid if that other person does not join.\*
- 145. In every contract of guarantee, there is an implied Implied promise to indempromise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

#### Illustrations.

(a) B is indebted to C, and A is surety for the debt. C demands payment from A, and, on his refusal, sues him for the amount. A defends the suit having reasonable grounds for doing so, but he is compelled to pay the amount of the debt with costs: He can recover from B the amount paid by him for costs as well as the principal debt.

- (b.) C lends B a sum of money, and A, at the request of B, accepts a bill of exchange drawn by B upon A to secure the amount. C, the holder of the bill, demands payment of it from A, and, on A's refusal to pay, sues him upon the bill. A, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from B the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.
- (c.) A guarantees to C to the extent of 2,000 rupees, payment for rice to be supplied by C to B. C supplies to B rice to a less amount than 2,000 rupees, but obtains from A payment of the sum of 2,000 rupees in respect of the rice supplied: A cannot recover from B more than the price of the rice actually supplied.
- 146. Where two or more persons are co-sureties for the same Co-sureties liable to condebt or duty, either jointly or severally, tribute equally.

  debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains uppaid by the principal debtor.\*

- (a,) A, B, and C are sureties to D for the sum of 3,000 rupees lent to, E. E makes default in payment: A, B, and C are liable, as between themselves, to pay 1,000 rupees each.
- (b) A, B, and C are sureties to D for the sum of 1,000 rupees lent to B, and there is a contract between A, B, and C that A is to be responsible to the extent of one quarter, B to the extent of one quarter, and C to the extent of one half. E makes default in payment: As between the sureties A is liable to pay 250 rupees, B 250 rupees, and C 500 rupess.
- 147. Co-sureties who are bound in different sums are liable
  Liability of co-sureties to pay equally as far as the limits
  bound in different sums. of their respective obligations permit.\*

- (a.) A, B, and C, as sureties for D enter into three several bonds, each in a different penalty, namely A in the penalty of 10,000 rupees, be in that of 20,000 rupees, C in that of 40 coo rupees, conditioned for D's duly accounting to E. D makes default to the extent of 30,000 rupees: A, B, and C are each liable to pay 10,000 rupees.
- (b.) A, B, and C, as sureties for D, enter into three several bonds each in a different penalty, namely. A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 40,000 rupees: A is liable to pay 10,000 rupees, and B and C 15,000 rupees each.

(c.) A, B, and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 70,000 rupees: A, B, and C have to pay each the full penalty of his bond.

fAct IX.

## CHAPTER IX.

## OF BAILMENT.

148. A 'bailment' is the delivery of goods by one person "Bailment," bailor," and to another for some purpose upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the persons delivering them. The person delivering the goods is called the "bailor." The person to whom they are delivered is called the "bailee."

Explanation.—If a person, already in possession of the goods of another, contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods, although they may not have been delivered by way of bailment.

- 149. The delivery to the bailee may be made by doing any Delivery to bailee how thing which has the effect of putting made. the goods in the possession of the intended bailee, or of any person authorized to hold them on his behalf.
- Bailor's duty to disclose the goods bailed, of which the bailor is faults in goods bailed.

  Bailor's duty to disclose the goods bailed, of which the bailor is faults in goods bailed.

  aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and, if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

- (a.) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured: A is responsible to B for damage sustained.
- (b.) A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured: B is responsible to A for the injury.

- 151. In all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed.\*\*
- 152. The bailee, in the absence of any special contract, is Bailee when not liable for loss, &c., of things bailed.

  has taken the amount of care of it described in section 151.
- 153. A contract of bailment is voidable at the option of the Termination of bailment by bailee's act inconsistent with conditions. bailed inconsistent with the condition of the bailment.

A lets to B for hire a horse for his own riding. B drives the horse in his carriage: This is, at the option of A, a termination of the bailment.

154. If the bailee makes any use of the goods bailed which
Liability of bailee making is not according to the conditions of the
unauthorized use of goods bailment, he is liable to make compensation to the bailor for any damage
arising to the goods from or during such use of them.

- (a.) A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care, but the horse accidentally falls, and is injured: B is liable to make compensation to A for the injury done to the horse.
- (b) A hires a horse in Calcutta from B expressly to march to Benares. A rides with due care, but marches to Cuttack instead. The horse accidentally falls, and is injured: A is liable to make compensation to B for the injury to the horse.
- 155. If the bailee, with the consent of the bailor, mixes the Effect of mixture, with goods of the bailor with his own goods, bailor's consent, of his goods the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

<sup>\*</sup> As to railway contracts, see the Indian Railways Act, 1890 (IX. of 1890), s. 72. Cf. also, as to liability of common carriers, s. 8 of the Carriers Act (III. of 1865).

156. If the bailee, without the consent of the bailor, mixes

Effect of mixture without the goods of the bailor with his own
bailor's consent when the goods, and the goods can be separated
goods can be separated. or divided, the property in the goods
remains in the parties respectively; but the bailee is bound to bear
the expense of separation or division, and any damage arising from
the mixture.

#### Illustration.

A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark: A is entitled to have his 100 bales returned, and B is bound to bear all the expense incurred in the separation of the bales and any other incidental damage.

Effect of mixture without the goods of the bailor with his own bailor's consent when the goods in such a manner that it is impossible to separate the goods bailed from the other goods, and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

### Illustration.

A bails a barrel of Cape-flour, worth Rs. 45, to B. B, without A's consent, mixes the flour with country flour of his own worth only Rs. 25 a barrel: B must compensate A for the loss of his flour.

- 158. Where, by the conditions of the bailment, the goods
  Repayment by bailor of are to be kept or to be carried, or to have work done upon them, by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.
- Restoration of goods lent its return if the loan was gratuitous, even gratuitously. though he lent it for a specified time or purpose. But, if, on the faith of such loan made for a specified time or purpose the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.\*

- Return of goods bailed on ing to the bailer's directions, the goods expiration of time or accombishment of purpose.

  bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.\*
- 161. If, by the fault of the bailee, the goods are not returned, Bailee's responsibility when delivered, or tendered at the proper goods are not duly returned. time, he is responsible to the bailor for any loss, destruction, or deterioration of the goods from that time.

Termination of gratuitous bailment by death.

162. A gratuitous bailment is terminated by the death, either of the bailor, or of the bailes.

168. In the absence of any contract to the contrary, the Bailor entitled to increase bailed is bound to deliver to the bailor, or profit from goods bailed. or according to his directions, any increase or profit which may have accrued from the goods bailed.

### Illustration.

A leaves a cow in the custody of B to be taken care of. The cow has a calf: B is bound to deliver the calf as well as the cow to A.

- 164. The bailor is responsible to the bailee for any loss

  Bailor's responsibility to which the bailee may sustain by reason bailee. that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions respecting them.
- 165. If several joint owners of goods bail them, the bailee

  Bailment by several joint may deliver them back to, or according owners. to the directions of, one joint owner without the consent of all in the absence of any agreement to the contrary.
- Bailee not responsible on re-delivery to bailor without title.

  Bailee not responsible on the bailor without title.

  Bailee not responsible on according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery ‡

\$ See the Indian Evidence Act (I. of 1872), s. 117.

<sup>\*</sup> But see ss. 24, 152, supra, and 170, infra, to the provisions of which this section must be subject.

<sup>†</sup> As to railway contracts, see the Indian Railways Act (IX. of 1890), s. 72.

- 167. If a person other than the bailor claims goods bailed, Right of third person claim- he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.
- Right of finder of goods: compensation for trouble and expense voluntarily incurred by him to preserve the goods, and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and, where the owner has offered a specific reward for the return of goods lost, may sue for specific remay sue for specific remay re ain the goods until he receives it.\*
- 169. When a thing, which is commonly the subject of sale.

  When finder of thing comiss lost, if the owner cannot with reasonmonly on sale may sell it.

  able dligence, be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it.
  - (1) when the thing is in danger of perishing or of losing the greater part of its value; or
  - (2) when the lawful charges of the finder in respect of the thing found amount to two-thirds of its value.†
- Bailee's particular lien. of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

- (a.) A delivers a rough diamond to B, a jeweller, to be cut and polished which is accordingly done: B is entitled to retain the stone till he is paid for the services he has rendered.
- (b.) A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished, and to give A three months credit for the price: B is not entitled to retain the coat until he is paid.
- 171. Bankers, factors wharfingers, attorneys of a High Court,

  General lien of bankers, and policy-brokers may, in the absence
  factors, wharfingers, attorof a contract to the contrary, retain, as
  neys, and policy-brokers.

  a security for a general balance of ac\_

<sup>\*</sup> See Story, Bailments, § 121a. † New York Civil Code, § 943.

count, any goods\* bailed to them;† but no other persons have a right to retain, as a security for such balance, goods bailed to them unless there is an express contract to that effect,±

## Bailments of Pledges.

172. The bailment of goods as security for payment of a "Pledge," "pawnor," debt or performance of a promise is called "pledge." The bailor is in this case called the "pawnor."

173. The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession, or for the preservation, of the goods pledged.

Pawnee not to retain for debt or promise other than that for which goods pledged.

Presumption in case of subsequent advances.

The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged, but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

175. The pawnee is entitled to receive from the pawnor Pawnee's right as to ex- extraordinary expenses incurred by him traordinary expenses incur- for the preservation of the goods red.

176. If the pawnor makes default in payment of the debt pawnee's rights where paw or performance, at the stipulated time, nor makes default. of the promise in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

<sup>\*</sup> Whether belonging to the bailor or not.

<sup>†</sup> As such.

<sup>‡</sup> As to the lien of an agent, see s. 221, infra. As to the lien of Railway Administrations, see the Indian Railways Act (IX. of 1890), s. 55. § Within three years from the making of the loan or the breach of the promise.—See the Indian Limitation Act (IX. of 1908), Sch. I., Nos. 57 and 115.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

177. If a time is stipulated for the payment of the debt or Defaulting pawnor's right performance of the promise, for which to redeem. the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them;\* but he must, in that case, pay, in addition, any expenses which have arisen from his default.

178. A person who is in possession of any goods, or of any Pledge by possessor of bill of lading, dock-warrant, warehouse-goods or of documentary title keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or documen's: Provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawner is acting improperly:

Provided also that such goods or documents have not been obtained from their lawful owner, or from any person in lawful custody of them, by means of an offence or fraud.

179. Where a person pledges goods in which he has only a Pledge where pawnor has limited interest, the pledge is valid to only limited interest. the extent of that interest.

## Suits by Bailees or Bailors against Wrong-doers.

180. If a third person wrongfully deprives the bailee of the Suit by bailor or balee use or possession of the goods bailed, or against wrong-doer. does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

<sup>\*</sup> For limitation, see the Indian Limitation Act (IX. of 1908), Sch. I. No. 145. † Cf. the Factors Act (5 & 6 Vict., c. 39), ss. 1 and 3.

181. Whatever is obtained by way of relief or compensation
Apportionment of relief in any such suit shall, as between the or compensation obtained by bailor and the bailee, be dealt with according to their respective interests.

## CHAPTER X.

### AGENCY.

Appointment and Authority of Agents.

"Agent" and "principal" defined.

"Agent" and "principal" defined.

"Agent" and "principal" defined.

"Agent" and "principal" another,\* or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal."

183. Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

Who may be an agent.

who is not of the age of majority and of sound mind can become an agent so as to be responsible to his principal according to the provisions in that behalf herein contained.

Consideration not necessary. 185. No consideration is necessary to create an agency.

Agent's authority may be 18 expressed or implied. may be

186. The authority of an agent may be expressed or implied.

187. An authority is said to be express when it is given by Definitions of express and words spoken or written. An authority implied authority. is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

<sup>\*</sup> Cf. s. 225, infra. As to the effect of an agent's fraud, see s. 17 supra, and s. 238, infra.

† Cf. s. 11, supra.

<sup>‡</sup> But see the Indian Registration Act (XVI. of 1908), s. 33, and the Code of Civil Procedure (Act V. of 1908), O. 111., r. 4.

A owns a shop in Serampore, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purposes of the shop, and of paying for them out of A's funds with A's knowledge: B has an implied authority from A to order goods from C in the name of A for the purposes of the shop.

188. An agent, having an authority to do an act, has authority to do every lawful thing which is necessary in order to do such act.

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.

### Illustrations.

- (a.) A is employed by B, residing in London, to recover at Bombay a debt due to B: A may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.
- (b.) A constitutes B his agent to carry on his business of a shipbuilder: B may purchase timber and other materials, and hire workmen, for the purpose of carrying on the business.
- 189. An agent has authority, in an emergency, to do all Agent's authority in an such acts for the purpose of protecting emergency.

  his principal from loss as would be done by a person of ordinary prudence in his own case under similar circumstances.\*

## Illustrations.

- (a.) An agent for sale may have goods repaired if it be necessary.
- (b.) A consigns provisions to B at Calcutta, with directions to send them immediately to C at Cuttack; B may sell the provisions at Calcutta if they will not bear the journey to Cuttack without spoiling.

## Sub-Agents.

190. An agent cannot lawfully employ another to perform When agent cannot dele- acts which he has expressly or impliedly gate. undertaken to perform personally, unless, by the ordinary custom of trade, a sub-agent may, or, from the nature of the agency, a sub-agent must, be employed.

<sup>\*</sup> But see s. 214, infra. 🕠 😘

- 191. A "sub-agent" is a person employed by, and acting under the control of, the original agent in the absence of the agency.
- 192. Where a sub-agent is properly appointed, the principal Representation of principal is, so far as regards third persons, pal by sub-agent properly represented by the sub-agent, and is appointed. by the principal acts, as if he were an agent originally appointed by the principal.

Agent's responsibility for sub-agent.

The agent is responsible to the principal for the acts of the sub-agent.

The sub-agent is responsible for his acts to the agent, but not to the principal, except in cases of fraud or wilful wrong.

- Agent's responsibility for appointed a person to act as a subsub-agent appointed without agent, the agent stands towards such authority.

  an agent, and is responsible for his acts, both to the principal and to third persons; the principal is not represented by, or responsible for, the acts of the persons so employed,\* nor is that person responsible to the principal.
- Relation between prinity to name another person to act for
  the principal in the business of the
  pointed by agent to act in
  business of agency.

  agency, has named another person
  accordingly, such person is not a subagent, but an agent of the principal for such part of the business
  of the agency as is entrusted to him.

- (a.) A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale: C is not a sub-agent, but is A's agent for the conduct of the sale.
- (b.) A authorizes B, a merchant in Calcutta, to recover the moneys due to A from C & Co. B instructs D, a solicitor, to take legal proceedings against C & Co. for the recovery of the money: D is not a sub-agent, but is solicitor for A.

<sup>\*</sup> Unless, of course, he ratifies them.—See s. 196, infra.

195. In selecting such agent for his principal, an agent is Agent's duty in naming bound to exercise the same amount of discretion as a man of ordinary prusuch person. dence would exercise in his own case; and, if he does this he is not responsible to the principal for the acts or negligence of the agent so selected.

Illustrations.

- (a.) A instructs B, a merchant, to buy a ship for him. B employs a ship-surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently, and the ship turns out to be unseaworthy. and is lost: B is not, but the surveyor is, responsible to A.
- (b.) A consigns goods to B, a merchant, for sale. B, in due course. employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds: B s not responsible to A for the proceeds.

## Ratification

196. Where acts\* Right of person as to acts done for him without his authority.

Effect of ratification.

pressed or implied.

are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such act. If he ratify them, the same effects will follow as if they had been performed by his authority.

197. Ratification may be expressed or may be implied in the conduct of the person on whose Ratification may be exbehalf the acts are done

## Illustrations.

- (a.) A, without authority, buys goods for B. Afterwards B sells them to C on his own account: B's conduct implies a ratification of the purchase made for him by A.
- (b.) A, without B's authority, lends B's money to C. Afterwards B accepts interest on the money from C: B's conduct implies a ratification of the loan.
- 198. No valid ratification can be made by a person whose knowledge of the facts of the case is Knowledge requisite to walld ratification. materially defective.

Effect of ratifying unauthorized act forming part of a transaction.

199. A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part.

<sup>\*</sup> That is, lawful acts.

200. An act done by one person on behalf of another, withRatification of unauthorized act cannot injure third
person.

the damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

### Illustrations.

- (a.) A, not being authorized thereto by B, demands, on behalf of B the delivery of a chattel, the property of B, from C, who is in possession of it: This demand cannot be ratified by B so as to make C liable for damages for his refusal to deliver.
- (b) A holds a lease from B, terminable on three months' notice. C, an unauthorized person, gives notice of termination to A: The notice cannot be ratified by B so as to be binding on A.

## Revocation of Authority.

- 201. An agency is terminated by the principal revoking his authority, or by the agent renouncing the business of the agency being completed, or by either the principal or agent dying or becoming of unsound mind, or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.\*
- 202. Where the agent has himself an interest in the pro-Termination of agency perty which forms the subject-matter of where agent has an interest the agency, the agency cannot, in the in subject-matter. absence of an express contract, be terminated to the prejudice of such interest.

- (a.) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A: A cannot revoke this authority, nor can it be terminated by his insanity or death.
- (b.) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances: A cannot revoke this authority, nor is it terminated by his insanity or death.

<sup>\*</sup> As to the law in force in presidency-towns, see the Indian Insolvency Act (r1 & 12 Vict., c. 21). As to the rest of British India, see the Code of Civil Procedure (Act XIV. of 1882), Ch. XX.

When principal may rewhe agent's authority has been exercised so as to bind the principal.

When principal may reauthority given to his agent at any time
before the authority has been exercised so as to bind the principal.

Revocation where authority to his agent after the authority has been partly exercised.

Revocation where authority to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency.

### Illustrations.

- (a.) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price: A cannot revoke B's authority so far as regards payment for the cotton.
- (b.) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cutton in A's name, and so as not to render himself personally liable for the price: A can revoke B's authority to pay for the cotton.
- 205. Where there is an express or implied contract that the Compensation for revocation by principal or renunction by agent.

  agency should be continued for any period of time, the principal must make compensation\* to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.
- 206. Reasonable notice must be given of such revocation

  Notice of revocation or reor renunciation, otherwise the damage
  nunciation. thereby resulting to the principal or the
  agent, as the case may be, must be made good to the one by the
  other.

Revocation and renunciation may be expressed or implied. 207. Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent, respectively.

### Illustration.

A empowers B to let A's house. Afterwards A lets it himself: This is an implied revocation of B's authority.

When termination of the authority of an agent does

When termination of not, so far as regards the agent, take agent's authority takes effect before it becomes known to him, fect as to agent, and as to third persons, before it becomes known to them.

## Illustrations.

- (a.) A directs B to sell goods for him, and agrees to give B five per cent. commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority B, after the letter is sent, but before he receives it, sells the goods for 100 rupees: The sale is binding on A, and B is entitled to five rupees as his commission.
- (b) A, at Madras, by letter, directs B to sell for him some cotton lying in a warehouse in Bombay, and afterwards by letter, revokes his authority to sell, and directs B to send the cotton to Madras. B, after receiving the second letter, enters into a contract with C who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds: C's payment is good as against A.
- (c.) A directs B, his agent, to pay certain money to C. A dies, and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C: The payment is good as against D, the executor.
- Agent's duty on termina- or becoming of unsound mind, the tion of agency by principal's agent is bound to take, on behalf of the death or insanity. representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.
- 210. The termination of the authority of an agent causes
  Termination of sub-agent's the termination (subject to the rules
  authority. herein contained regarding the termination of an agent's authority) of the authority of all sub-agents
  appointed by him.

## Agent's Duty to Principal.

211. An agent is bound to conduct the business of his prinAgent's duty in conducting cipal according to the directions given
principal's business. by the principal,\* or, in the absence of
any such directions, according to the custom which prevails in
doing business of the same kind at the place where the agent conduct
such business. When the agent acts otherwise, if any loss be

sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

### Illustrations.

- (a.) A, an agent engaged in carrying on for B a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investments: A must make good to B the interest usually obtained by such investments.
- (6.) B, a broker in whose business it is not the custom to sell on credit, sells goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes insolvent: B must make good the loss to A.
- 212. An agent is bound to conduct the business of the Skill and diligence requiragency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill, or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill, or misconduct.

- (a.) A, a merchant in Calcutta, has an agent, B in London, to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent: B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as, e. g., by variation of rate of exchange—but not further.
- (b.) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual enquiries as to the solvency of B. B, at the time of such sale, is insolvent: A must make compensation to his principal in respect of any loss thereby sustained.
- (c<sub>e</sub>) A, an insurance-broker, employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the under-writers: A is bound to make good the loss to B.
- (d.) A, a merchant in England, directs B, his agent at Bombay, who accepts the agency, to send him too bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival, the price of cotton rises: B is

bound to make good to A the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

Agent's accounts.

213. An agent is bound to render proper accounts to his principal on demand.

Agent's duty to communicate with principal.

214. It is the duty of an agent, in case of difficulty, to use all reasonable diligence in communicating with his principal, and seeking to obtain his instructions.\*

Right of principal when agent deals on his own account in business of agency without principal's consent.

215. If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal, and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may

repudiate the transaction if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

## Illustrations.

(a.) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b.) A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy in ignorance of the existence of the mine : A, on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

Principal's right to benefit gained by agent dealing on his own account in business of agency.

216. If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

### Illustration.

A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself: A may, on discovering

that B has bought the house, compel him to sell it to A at the price he gave for it.

- Agent's right of retainer account of the principal in the business out of sums received on principal's account.

  Agent's right of retainer account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.
- 218. Subject to such deductions, the agent is bound to pay
  Agent's duty to pay sums to his principal all sums received on
  received for principal.
- 219. In the absence of any special contract, payment for the When agent's remunera- performance of any act is not due to tion becomes due. the agent until the comple on of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.
- 220. An agent, who is guilty of misconduct in the business

  Agent not entitled to remuneration for business misremuneration in respect of that part of the
  business which he has misconducted.

- (a.) A em'oys B to recover 1,00,000 rupees from C, and to lay it out on good security. B recovers the 1,00,000 rupees, and lays out 00,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby A loses 2,000 rupees. B is entitled to remuneration for recovering the 10,000 rupees, and for investing the 20,000 rupees. He is not entitled to any remuneration for nvesting the 10,000 rupees, and he must make good the 2,000 rupees to B.
- (b.) A employs B to recover 1,000 rupees from C. Through B's misconduct, the money is not received: B is entitled to no remuneration for his services, and must make good the loss.
- 221. In the absence of any contract to the contrary, an agent
  Agent's lien on principal's is entitled to retain goods, papers, and
  property. other property, whether moveable or

<sup>\*</sup> See s. 221, infra. † See ss. 195, 211 to 214, and 218, supra.

immoveable, of the principal, received by him until the amount due to himself for the commission, disbursements, and services in respect of the same, has been paid or accounted for to him.\*

## Principal's Duty to Agent.

Agent to be indemnified against consequences of lawful acts.

222. The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

## Illustrations.

- (a.) B, at Singapore, under instructions from A, of Calcutta, contracts with C to deliver certain goods to him. A does not send the goods to B. and C sues for breach of contract. B informs A of the suit, and A authorized him to defend the suit. B defends the suit, and is compelled to pay damages and costs, and incurs expenses: A is liable to B for such damages, costs, and expenses.
- (b.) B, a broker at Calcutta, by the orders of A, a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil and C sues B. + B informs A, who repudiates the contract. altogether. B defends but unsuccessfully, and has to pay damages and costs. and incurs expenses: A is liable to B for such damages, costs and expenses.
- 223. Where one person employs another to do an act, and the agent does the act in good faith, the Agent to be indemnified employer is liable to indemnify the agent against consequences of acts done in good faith. against the consequences of that act though it causes an injury to the rights of third persons.

- (a) A, a decree-holder, and entitled to execution of B's goods, requires the officer of the Court to seize certain goods representing them to be the goods of B. The officer seizes the goods, and is sued by C, the true owner of the goods: A is liable to indemnify the officer for the sum which he is compelled to pay to C in consequence of obeying A's directions.
- (b.) B, at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this, and hands over the proceeds of the sale to A: Afterwards C, the true owner of the goods, sues B, and recovers the value of the goods and costs: A is liable to indemnify B for what he has been compelled to pay to C, and for B's own expenses.

<sup>\*</sup> As to the general lien of an agent who is a banker, factor, attorney, or policy-broker, see s. 171, supra.

t it must be assumed that the disclosed principal could not be sued.-See s. 230, infra.

224. Where one person employs another to do an act which Non-liability of employer of is criminal, the employer is not liable to agent to do a criminal act. the agent, either upon an express or an implied promise to indemnify him against the consequences of that act.\*

### Illustrations.

- (a.) A employs B to beat C, and agrees to indemnify him against all consequences of the act. B thereupen beats C, and has to pay damages to C for so doing: A is not liable to indemnify B for those damages.
- (b) B, the proprietor of a newspaper, publishes, at A's request, a libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C, and has to pay damages, and also incurs expenses: A is not liable to B upon the indemnity.
- 225. The principal must make compensation to his agent Compensation to agent for in respect of injury † caused to such agent by the principal's neglect or want of skill.

## Illustration.

A employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskilfully put up, and B is in consequence hurt.: A must make compensation to B.

# Effect of Agency on Contracts with Third Persons.

226. Contracts entered into through an agent, and obligations

Enforcement and consequences of agent's conbe enforced in the same manner, and
will have the same legal consequences,
as if the contracts had been entered into, and the acts done, by the
principal in person.

- (a.) A buys goods from B, knowing that he is an agent for their sale, but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set off against that claim a debt due to himself from B.
- (b) A, being B's agent, with authority to receive money on his behalf, receives from C a sum of money due to B: C is discharged of his obligation to pay the sum in question to B.

<sup>\*</sup> See s. 24, sugra. + Cf. the Indian Fatal Accidents Act (XIII. of 1855.)

227. When an agent does more than he is authorized to do,
Principal bow far bound and when the part of what he does,
when agent exceeds author—which is within his authority, can be
separated from the part which is beyond
his authority, so much only of what he does as is within his authority
is binding as between him and his principal.

### Illustration.

A, being owner of a ship and cargo, authorizes B to procure an insurance for 4,000 rupees on the ship. B procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo: A is bound to pay the premium for the policy on the cargo.

228. Where an agent does more than he is authorized to do.

Principal not bound when and what he does beyond the scope of excess of agent's authority is his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

### Illustration.

A authorizes B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6,000 rupees: A may repudiate the whole transaction.

229. Any notice given to, or information obtained by the Consequences of notice agent, provided it be given or obtained given to agent. in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to, or obtained by, the principal.

- (a.) A is employed by B to buy from C certain goods of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale. A learns that the goods really belonged to D, but B is ignorant of that fact: B is not entitled to set off a debt owing to him from C against the price of the goods.
- (b.) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set off against the price of the goods a debt owing to him from C.
- 280. In the absence of any contract to that effect, an agent Agent cannot personally cannot personally enforce contracts enentered not be bound by tered into by him on behalf of his principal.

  cipal, nor is he personally bound by them.

Presumption of contract to Such a contract shall be presumed contrary. to exist in the following cases:—

- (1.) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad:
- (2.) Where the agent does not disclose the name of his principal:
- (3.) Where the principal, though disclosed, cannot be sued.
- 231. If an agent makes a contract with a person who neither Rights of parties to a contract made by agent not dishe is an agent, his principal may reclosed.

  but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

### Illustration.

A, who owes 500 rupees to B, sells 1,000 rupees' worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge, nor reasonable ground of suspicion, that such is the case: C cannot compel B to take the rice without allowing him to set off A's debt.

- 232. Where one man makes a contract with another, neither Performance of contract knowing, nor having reasonable ground with agent supposed to be to suspect, that the other is an agent, principal. the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.
- 283. In cases where the agent is personally liable, a person Right of person dealing dealing with him may hold either him with agent personally liable. or his principal, or both of them liable.

### Illustration.

A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C: A may sue either B or C, or both, for the price of the cotton.

234. When a person who has made a contract with an Consequence of inducing agent induces the agent to act upon the agent or principal to act on belief that the principal only will be belief that principal or agent will be held exclusively liable.

will be held liable, he cannot afterwards hold liable the agent or principal, respectively.

235. A person untruly\* representing himself to be the Liability of pretended authorized agent of another, and thereagent. by inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

236. A person with whom a contract has been entered person falsely contracting into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

Liability of principal in- incurred obligations to third persons ducing belief that agent's on behalf of his principal, the principal unauthorized acts were is bound by such acts or obligations if authorized.

He has, by his words or conduct, induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

- (a.) A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price: A is bound by the contract.
- (b.) A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A: The sale is good.
- 238. Misrepresentations made, or frauds committed, by Effect, on agreement, of agents acting in the course of their misrepresentation or fraud business for their principals, have the by agent.

  same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principal; but misrepresentations

<sup>\*</sup> See s. 208, supra.

made, or frauds committed, by agents in matters which do not fall within their authority, do not affect their principals.

#### Illustrations .

- (a.) A being B's agent for the sale of goods, induces C to buy them by a misrepresentation which he was not authorized by B to make: The contract is voidable as between B and C at the option of C.
- (b.) A, the captain of B's ship, signs bills of lading without having received on board the goods mentioned therein: The bills of lading are void as between B and the pretended consignor.

## CHAPTER XI.

## OF PARTNERSHIP.

239. "Partnership" is the relation which subsists between persons who have agreed to combine their property, labour, or skill in some business, and to share the profits thereof between them.\*

" Firm " defined.

Persons who have entered into partnership with one another are called collectively a "firm."

## Illustrations.

- (a.) A and B buy 100 bales of cotton, which they agree to sell for their joint account. A and B are partners in respect of such cotton.
- (b.) A and B buy 100 bales of cotton, agreeing to share it between them: A and B are not partners.
- (c.) A agrees with B, a goldsmith, to buy and furnish gold to B, to be worked up by him and sold and that they shall share in the resulting profit or loss: A and B are partners.
- (d.) A and B agree to work together as carpenters, but that A shall receive all profits, and shall pay wages to B: A and B are not partners.
  (e) A and B are joint owners of a ship: This circumstance does not make them partners.
- 240. A loan to a hender not a partner by advancing money for share of profits.

person engaged or about to engage in any trade or undertaking upon a contract with such person that the lender shall receive interest at a rate varying

<sup>\*</sup> This would apply to members of joint-stock Companies; but the law applicable to them is saved by s. 266, in/ra.

with the profits, or that he shall receive a share of the profits, does not, of itself, constitute the lender a partner, or render him responsible as such.\*

Property left in business by retiring partner or deceased partner's representative

241. In the absence of any contract to the contrary, property left by a retiring partner or the representative of a deceased partner to be used in the business is to be considered a loan within the meaning of the last-preceding section.

242. No contract for the remuneration of a servant or agent of any person engaged in any trade or Servant or agent remuundertaking by a share of the profits nerated by share of profits not a partner. of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner.

243. No person, being a widow or child of a deceased Widoworchild of deceased partner of a trader, and receiving, by partner receiving annuity out way of annuity, a proportion of the proof profits not a partner. fits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of such trader, or be subject to any liabilities incurred by him.

244. No person receiving, by way of annuity or otherwise, a Person receiving portion of portion of the profits of any business profits for sale of good-will in consideration of the sale by him of not a partner. the good-will of such business, shall, by reason only of such receipt, be deemed to be a partner of the person carrying on such business, or be subject to his liabilities t

245. A person who has, by words spoken or written, or by Responsibility of person his conduct, led another to believe leading another to believe that he is a partner in a particular firm, him a partner. is responsible to him as a partner in such

246. Any one consenting to allow himself to be represented as a partner is liable, as such, to third Liability of person permitting himself to be represented persons who, on the faith thereof, give as a partner. credit to the partnership. ‡

See Mollwo March & Co. v. Court of Wards, 10 B. L. R. 312.

<sup>†</sup> Cf. the Partnership Act, 1865 (Stat. 28 & 29 Vict., c. 86), s. 4. I See the Indian Evidence Act (I. of 1872); s. 109.

- 247. A person who is under the age of majority according to the law\* to which he is subject may Minor partner not personally liable, but his share is. be admitted to the benefits of partnership, but cannot be made personally liable for any obligation of the firm; but the share of such minor in the property of the firm is liable for the obligations of the firm.
- 248. A person who has been admitted to the benefits of partnership under the age of majority\* Liability of miner partner becomes, on attaining that age, liable on attaining majority. for all obligations incurred by the partnership since he was so admitted unless he gives public notice, within a reasonable time, of his repudiation of the partnership.
- 249. Every partner is liable for all debts and obligation Partner's liability for debts incurred while he is a partner in the usual course of business by, or on behalf of partnership. of, the partnership; but a person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of such firm for anything done before he became a partner.
- Partner's liability to third person for neglect or fraud of co-partner.

250. Every partner is liable to make compensation to third persons in respect of loss or damage arising from the neglect or fraud of any partner in the management of the business of the firm.

4 Selection of the property 
251. Each partner, who does any act necessary for, or usually done in, carrying on the business of Fartner's power to bind such a partnership as that of which he is co-partners. a member, binds his co-partners to the same extent as if he were their agent duly appointed for that purpose.

Exception.—If it has been agreed between the partners that any restriction shall be placed upon the power of any one of them. no act done in contravention of such agreement shall bind the firm with respect to persons having notice of such agreement.

#### Illustrations.

(a) A and B trade in partnership, A residing in England, and B in India. A draws a bill of exchange in the name of the firm. B has no notice of the bill, nor is he at all interested in the transaction: The firm

See the Indian Majority Act (IX. of 1875).

is liable on the bill provided the holder did not know of the circumstances under which the bill was drawn.

- (b.) A, being one of a firm of solicitors and attorneys, draws a bill of exchange in the name of the firm without authority: The other partners are not liable on the bill.
- (c.) A and B carry on business in partnership as bankers. A sum of money is received by A on behalf of the firm. A does not inform B of such receipt, and afterwards A appropriates the money to his own use. The partnership is liable to make good the money.
- (d.) A and B are partners. A, with the intention of cheating B, goes to a shop and purchases articles on behalf of the firm, such as might be used in the ordinary course of the partnership-business, and converts them to his own separate use, there being no collusion between him and the seller: The firm is liable for the price of the goods.
- 252. Where partners have by contract regulated and defined,
  Annulment of contract defining partners' rights and obligations, such contract can be annulled or altered only by consent of alls of them, which consent must either be expressed or be implied from a uniform course of dealing.

#### Illustration.

A, B, and C, intending to enter into partnership, execute written articles of agreement, by which it is stipulated that the net profits arising from the partnership-business shall be equally divided between them. Afterwards they carry on the partnership-business for many years. A receiving one-half of the net profits, and the other half being divided equally between B and C. All parties know of and acquiesce in this arrangement. This course of dealing supersedes the provision in the articles as to the division of profits.

Rules determining partners' mutual relations where no contract to contrary. 258. In the absence of any contract to the contrary, the relations of partners to each other are determined by the following rules:—

(1.) All partners are joint owners of all property originally brought into the partnership-stock, or bought with money belonging to the partnership, or acquired for purposes of the partnership-business. All such property is called partnership-property. The share of each partner in the partnership-property is the value of his original contribution increased or diminished by his share of profit or loss:

- (2) All partners are entitled to share equally in the profits of the partnership-business, and must contribute equally towards the losses sustained by the partnership:
- (3.) Each partner has a right to take part in the management of the partnership-business:
- (4.) Each partner is bound to attend diligently to the business of the partnership, and is not entitled to any remuneration for acting in such business:
- (5.) When differences arise as to ordinary matters connected with the partnership business, the decision, shall be according to the opinion of the majority of the partners; but no change in the nature of the business of the partnership can be made except with the consent of all the partners:\*
- (6.) No person can introduce a new partner into a firm without the consent of all the partners:
- (7.) If, from any cause whatsoever, any member of a partnership ceases to be so, the partnership is dissolved as between all the other members:
- (3.) Unless the partnership has been entered into for a fixed term, any par ner may retire from it at any time:
- (9.) Where a partnership has been entered into for a fixed term, no partner can, during such term, retire except with the consent of all the partners, nor can be be expelled by his partners for any cause whatever except by order of Court:
- (10.) Partnerships, whether entered into for a fixed term or not, are dissolved by the death of any partner.

When Court may dissolve partnership.

254. At the suit of a partner, the Court may dissolve the partnership in the following cases:—

- (1.) When a partner becomes of unsound mind:
- (2.) When a partner, other than the partner suing, has been adjudicated an insolvent under any law relating to insolvent debtors:
- (3.) When a partner, other than the partner suing, has done any act by which the whole interest of such partner is legally transferred to a third person:

- (4.) When any partner becomes incapable of performing his part of the partnership-contract:
- (5.) When a partner, other than the partner suing, is guilty of gross misconduct in the affairs of the partnership, or towards his
- (6.) When the business of the partnership can only be carried on at a loss.

Dissolution of partnership by prohibition of business.

255. A partnership is in all cases dissolved by its business being prohibited by law.

Rights and obligations of partners in partnership continued after expiry of term for which it was entered into,

256. If a partnership entered into for a fixed term be continued after such term has expired, the rights and obligations of the partners will. in the absence of any agreement to the contrary, remain the same as they were at the expiration of the term, so far as such rights and obligations can be applied to a partnership dissolvable at the will of any partner.

257. Partners are bound to carry on the business of the partnership for the greatest common advantage, to be just and faithful to each General duties of partners. other, and to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

Account to firm of benefit derived from transaction affecting partnership.

258. A partner must account to the firm for any benefit derived from a transaction affecting the partnership.

#### Illustrations.

- (a.) A, B, and C are partners in trade. C, without the knowledge of A and B, obtains for his own sole benefit a lease of the house in which the partnership-business is carried on: A and B are entitled to participate, if they please, in the benefit of the lease.
- (b.) A, B, and C carry on business together in partnership as merchants trading between Bombay and London. D, a merchant in London, to whom they make their consignments, secretly allows C a share of the commission which he receives upon such consignments in consideration of C's using his influence to obtain the consignment for him: C is liable to account to the firm for the money so received by him.
- 259. If a partner, without the knowledge and consent of the other partners, carries on any business Obligations to firm of partcompeting or interfering with that of the ner carrying on competing business. firm, he must account to the firm for all

profits made in such business, and must make compensation to the firm for any loss occasioned thereby.

- 280. A continuing guarantee, given either to a firm or to a Revocation of continuing third person, in respect of the transacguarantee by change in firm. tions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or in respect of the transactions of which, such guarantee was given.\*
- 231. The estate of a partner who has died is not, in the ab-Non-liability of deceased sence of an express agreement, liable in respect of any obligation incurred by the quent obligations.
- 262. Where there are joint debts due from the partnership Payment of partnership and also separate debts due from any debts and of separate debts. partner, the partnership property must be applied, in the first instance, in payment of the debts of the firm; and, if there is any surplus, then the share of each partner must be applied in payment of his separate debts, or paid to him. The separate property of any partner must be applied, first, in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.
- 268. After a dissolution of partnership, the rights and obli-Continuance of partners' gations of the partners continue in all rights and obligations after things necessary for winding up the busidissolution. ness of the partnership.
- 264. Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given unless they themselves had notice of such dissolution.
- 265.† Where a partner is entitled to claim a dissolution of Winding-up by Court on partnership, or where a partnership has dissolution or after terminated, the Court may, in the abtion.

  sence of any contract to the contrary, wind-up the business of the partnership, provide for the payment

<sup>\*</sup> Cf. The Mercantitle Law Amendment Act, 1856 (Stat. 19 & 20 Vict.)

<sup>†</sup> S. 265 has been substituted for the original section by the Indian Contract Act Amendment Act (IV. of 1886), s. 1.

of its debts, and distribute the surplus, according to the shares of the partners respectively.

266. Extraordinary

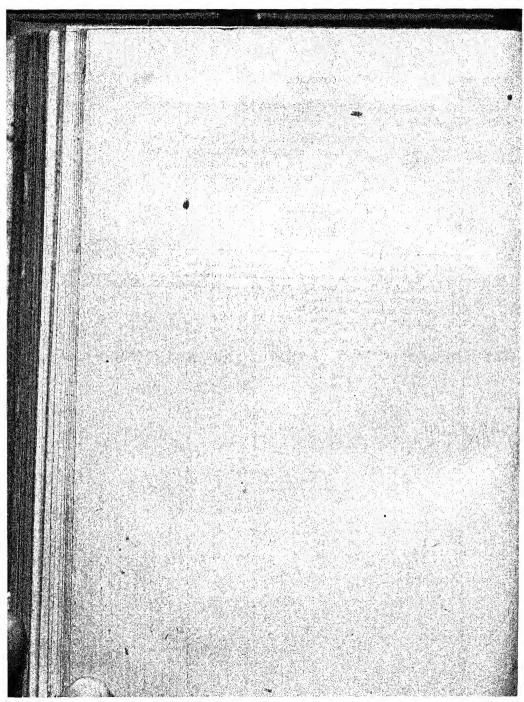
Limited-liability partnerships, incorporated partnerships, and joint-stock companies.

partnerships, such as partnerships with limited liability, incorporated partnerships, and joint-stock companies shall be regulated by the law for the time being in force relating thereto.\*

## SCHEDULE:

† The Schedule has been repealed by Act X. of 1914.

<sup>\*</sup> See the Indian Companies Act (VI. of 1882) and the following special Acts: V. of 1838 (Bengal Bonded Warehouse) as amended by Act V. of 1854; V. of 1857 (Oriental Gas Company) as amended by Act XI. of 1867; the Presidency Banks Act (XI. of 1876); Madras Act VI. of 1869 (Madras Equitable Assurance Society) &c.



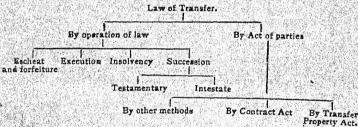
## NOTES ON

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# Transfer of Property Act.

## INTRODUCTION.

Introduction.—The Transfer of Property Act, it should be remembered, does not deal with the law of mortgage only, but also, in the words of the Law Commissioners of 1879 "read with Contract Act, covers almost the whole of the ground, which could be profitably occupied by law relating to transfer inter vivos of interest in property." So "this Act is, so far as it deals with immoveable property and debts, a partial measure." This Act does not affect any transfer by operation of law, or by or in execution of a decree or order of a Court of competent jurisdiction, save as provided by s. 57 and Chapter IV. of the Act. The Law of Transfer, can be divided thus:—



I. Transfer by operation of law.—Those transfers which are not made by the consent of the transferor fall into this category. They are not the subject matter of this Act. So sale in execution of a decree is exempted from the operation of this Act.—Krishna v. Perachan, 15 M. 383.

II. Transfer by Act of parties.—There are two kinds of transfer namely, (a) Testamentary and (b) Inter vivos,

(a) Testamentary.—In cases of testamentary transfer or succession the transferee gets the property at the death of the transferor and not before. The document by which the transfer is made is called a "will." The law of testamentary succession is laid down in the Succession Act and Hindu Wills Act.

(b) Transfer Inter vivos.—This kind of transfer can take place when both the transferor and the transferee are living. The Transfer of Property Act contains mainly the provisions of these kinds of transfer.

Subject-matter of transfer.—Any property moveable or immoveable may be the subject-matter of transfer. The word property includes not only such tangible thing which possesses any value but also comprises such incorporeal and intangible things as are capable of being owned and transferred. The only requirement is that it must be in existence at the time of transfer.

Requisites of transfer.—In order that a transfer may take effect it is absolutely necessary that there must be two persons, namely, the transferor and the transferee. These two persons must be living and competent in the eye of the law. Cerporation is a person according to law and as such can be one of the parties.

## PREAMBLE.

Transfer of property Act.—The Transfer of Property Act is neither a complete code nor an exhaustive one.—Satyabati v. Harabati, 34, C. 224. "It must be remembered that, when Act No. IV. of 1882 was brought upon the Indian Statute Book, it was brought on because, according to the preamble, it was expedient to define and amend certain parts of the law relating to the transfer of property by act of parties."—Tajja v. Bhagwan, 16 A. 295.

Interpretation of Act .- "The proper course is, in the first instance to examine the language of Statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law and not to start with enquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactments will bear an interpretation in conformity with this view. If a Statute, intended to embody in a Code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a Statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, roaming over a wast number of authorities in order to discover what the law was extracting it by a minute critical examination of the prior decisions."-Narendra v. Kamalbasini, 23 C. 565 (571-72).

## Section 1.

Operation of the Act,—The Act came into operation on the 1st July 1882. As this enactment deals with substantive rights so by

general principle no retrospective affect is given to it. Thus it does not affect any transaction which took place before it came into force.—Vide Kailash v. Hari, 10 C. L. J. 110.

## Section 2.

Clause (c).—Previous to the passing of the Transfer of Property Act, tenancies of homestead land created for the purpose of habitation were not transferable except by custom or usage:—Hanuman Prasad Singh v. Deo Charan Singh, 7 Cal. L. J. 309.

Local Law has heen saved expressly in the case of leases of immoveable property under section 106. The Local Acts X. of 1859, XII. of 1881, XIX. of 1868, XXVIII. of 1868, Bengal Act VIII. of 1869 (which was repealed by Act VIII. of 1885), Madras Act VIII. of 1865, containing provisions regulating the relation of landlord and tenant, all remain untouched.

Local Usage has been expressly saved in s. c8 on the subject of mortgage not described in s. 58, clauses (b), (c), (d), and (e); in s. 106, on the subject of duration of certain leases in absence of written contract; in s. 108 on the rights and liabilities of lessor and leases.

Hindu, Muhammadan, or Budhist law .- The 2nd chapter of this Act containing general provisions of transfer of property, whether moveable or immoveable, from s. 5 to s. 53, shall not affect any rule of Hindu, Muhammadan, or Budhist law. The Hon'ble Mr. Crosthwaite made the following remarks while discussing the merits of the Transfer or Property Bill in the Legislative Council. "But another class of objectors arose at the last moment represented by Raja Siva Prasad. This gentleman and his friends objected to the Bill, not because it infringed Hindu law, but because it did not infringe it. The question which they would raise was a very large one-whether Hindus had the power of creating perpetuities or not. The Privy Council had decided that they had no such power, and the Bill in s. 14 was framed accordingly. But there appeared to be so strong a desire on the part of the Hindus that these milings should not be affirmed by the Legislature until the Hindus interested in them had been able to contest the point further, that they thought it best to save Hindu, Muhammadan, and Budhist law, from the operation of Chapter II.

Section 3.

Immoveable property.—This term has been defined on the principle of exclusion. This definition has been borrowed from the last line of the definition of "immoveable property" in the Indian Registration Act (III. of 1877). According to the General Clauses Act (X. of 1897) immoveable property "shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth." The same definition is given in the General Clauses Act (I. of 1868).

Attached.—"Attached" not only means rooted as trees, and imbedded as walls or buildings, but it also means attached to walls or buildings etc., for their permanent beneficial enjoyment, such as, the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith. It should be noted that these things are included within the meaning of "immoveable property."—See Peru v. Roneo, 11 C. 164; Purshotam v. Muncipal Council of Bellary, 14 M. 467.

Imbedded.—The word imbedded means affixed or annexed. A heavy thing placed on land or a granary erected on strandles cannot be said imbedded.

Notice.—The definition of the word "notice" in this section correctly codifies the law as to "notice" which existed prior to the passing of the Act (Churaman v Balli, 9 A. 591). This definition of notice is comprehensive (Preconath v. Ashutosh, 27 C. 358). There are two kinds of notice namely;—(1) Actual Notice; and (2) constructive. The constructive notice again is divided into three classes, vis.;—(a) when but for wilful abstention from an enquiry or search which he ought to have made, one would have known it; (b) when but for gross negligence one would have known it; and (c) when information of a fact is given to or obtained by one's agent under circumstances mentioned in s. 229 of the Contract Act.

- (1) Actual Notice.—When a person actually knows a thing he is said to have actual notice of it. Such a notice must be "explicit and positive, but need not be worded with the accuracy of plea." Mere vague report from uninterested person or suspicion of the existence of any fact are not notice. Actual notice must be proved as any other fact.
- (a) Constructive Notice.—This notice by construction of law, as notice to an agent is notice to the principal. In cases of constructive notice, "knowledge which the Court imputes to la person upon a presumption so strong that it cannot be allowed to be rebutted, that the knowledge must have been communicated.—Hewith v. Loossmors, 9 Hare 449 (455). Under this section presumption arises (a) from wilful abstintion, (b) from gross negligence, and (c) from agent's knowledge. Constructive notice is in its nature no more than evidence of notice, the weight of evidence being such that Court imputes to purchaser that he had notice.—Snells' Equity, p. 33.
- (a) Wilful abstention.—When a person designedly abstains from enquiry for the very purpose of avoiding notice—a purpose which, if proved, would clearly show that he had a suspicion of truth, and a fraudulent determination not to learn it. "Fraudulent turning away from knowledge of facts," which is nothing but "fraudulent and wilful blindness," is equivalent in legal consequence to "actual notice," Wilful abstention must be from an enquiry which he ought to have made, or in others words, which he was under a legal obligation

or duty bound to make, that is, wilful omission of a duty which may be evidence of fraudulent omission or gross negligence.—See also Fones v. Smith, 1 Hare 55.

(b) Gross negligence.—It means negligence which is palpable or stupid (hence culpable) inattention or carelessness (i.e., want of diligence) as well as wanting in duty. It does not mean mere want of caution which a person having means of obtaining the information might have, by prudent caution, obtained it, but it involves the idea of not obtaining information through gross or culpable negligence. In order to bind a person, it must be shown not only that he might have acquired, but also he ought to have acquired, but for gross or culpable negligence he had not acquired the information. Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulated the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.—Blyth v. Birmingham Waterworks Co., it Ex., 784. Under s. 78 the legal consequence of fraud, misrepresentation, and gross neglect are the same.

Registration whether notice.—The American doctrine that registration operates as constructive notice has been adopted by the Bombay High Court in the Full Bench decision of 6 B, 168 (Lakshmandas v. Dasrat), But it does not seem to be the correct principle of law, because to bind a person by constructive notice, it must be shown that, not only he had means of obtaining the notice by enquiry in the Registry office, but also he ought to have enquired in the Registry office in order to get the notice.—Shan Maun v. Madras Building Co., 15 M. 268. So according to the Calcutta and the Madras High Courts registration is not a notice.—Bushell v. Bushell, 28 Ch. and L. 90; Prio v. Ashu, 27 C. 358; Bunwari v. Ramjee, 7 C. W. N. 11; Durga v. Baney, 7 C. 199; Shan v. Madras Building Co., 15 M. 268. But according to the Bombay and Allahabad High Courts registration is a notice.—Lakshmandas v. Dasrat, 6 B, 108; Matadia v. Kasim, 13 A. 432.

Possession:—Possession for some years was held sufficient notice.—Jugal v. Kartic, 21 C. 116. Possession by a third party is sufficient to put the purchaser on enquiry.—Gunamoni v. Bussunf. 16 C. 414.

(c) Agent's knowledge.—The maxim of the law is "Qui facit per alium facit perse, i.e.," who does by another, does by himself." The principal cannot plead that the knowledge of the facts was withheld from him by the agent. Construtive notice will be attributed to the principal if information of a given fact be obtained by the agent in the course of business transacted by him as agent, whether he communicated it to the principal or not. S. 229 of the Contract Act is silent as to whether constructive notice, which may be imputed to the agent on account of his wilful abstention or gress negligence, will bind also the principal. The

duty of the agent being to represent the principal in his dealings with third persons, we think that the principal cannot avoid the imputation of constructive notice which the agent ought to have obtained, after the exercise of due diligence. The principle of law is based upon conwenience, and therefore, although the agent be interested in witholding the communication from the principal, still the principal will be bound. As fraud vitiates the most formal acts, and as no one can take advantage of any fraud, fraud or fradulent conduct on the part of the agent, or if the agent be a party to a scheme or conspiracy, or design of fraud in withholding the communication from the principal, then the latter is not bound, because the agent was not only acting as agent, but also as a party to the scheme, and the knowledge which he attained was attained by him in the latter character, and therefore there is no ground on which it can be presumed that the duty of an agent was performed by the person who filled that double character.

#### Section 4.

Note.—The last clause has been added by section 3 of Act III. of 1885, after some difficulty expressed in I. L. R., 8 Cal., F. B., 597 (612). See I. L. R., 19 Cal. 623 (F.B.), and notes under s. 54. "The amending Act III. of 1885 provided that this section should be read as supplemental to the Indian Registration Act (III. of 1877). Its effect is to make s. 54, para. 3, absolute."

"Read with the Contract Act, this Bill covers almost the whole of the ground which could be profitably occupied by law relating to the transfer inter vivos of interests in property; and for the convenience of the practitioner it could hardly be enacted in a more accessible form."

S. 54, paras. 2 and 3, relate to sale how made.

S. 59 relates to mortgage when to be by assurance.

S. 107 relates to leases how made.

S. 123 relates to gift how effected.

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## CHAPTER II.

Notes.—Cf clause (d) of section 2.—"And nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan, or Budhist law."

This Chapter has been sub-divided into 2 parts, viz., (A) and (B), of which (A) contains from 5 to 37 altogether 33 sections, which are applicable to moveable as well as to immoveable property, and (B) contains from 38 to 53, altogether 16 sections, which are applicable exclusively to immoveable property.

The provisions of this chapter are not generally inapplicable to the Hindus, Muhammadans, or Budhists, but when they conflict with any rule of Hindu, Mumammadan, or Budhist law (experience shows that they do not conflict), the latter will prevail.

#### Section 5.

Living person.—The word persona had, in the usage of Roman Law, a different meaning from that which we ordinarily attach to the word person. Whoever or whatever was capable of having and being subject to rights was a persona. Many persona, however, had no physical existence. The law clothed certain abstract conceptions with an existence, and attached to them the capability of having, and being subject to, rights. The law, for instance, treated the State as a persona, capable, for example, of owning land or slaves. So, a corporation, or an ecclesiastical institution, was a persona quite apart from the individual persona who formed the one and administered the other. Even the fiscus, or imperial treasure, as being the symbol of the abstract conception of the emperor's claims, was spoken of as a persona. Such persons as were the mere creation of law, as corporations, ceased to exist when the law in any way put an end to their existence, as by the dissolution of the corporation.—Sandars' Institutes of Fustinian.

Not only the property, but also the transferor and the transferee, must be inesse at the date of the transfer.

In future is an adverbial phrase qualifying "conveys," which signifies that an interest may be created by a transfer which will take effect in future.—See ss. 13, 14, 15, 16, and 20. See also I. L. R., 2 Bom, 353 (Navabin Lakshman v. Anant Babaji). In such a case conveyance is made to the trustees for the benefit of the real transferees.

To himself.—When the transferor happens to be a member of a corporation or a firm, which becomes the transferee, then the individual person may be said to transfer property to himself and to others.

Property.—Property is a term of complex or various meaning. As this term has been used in this Act in various meanings, and as it is not feasible to give such an accurate and precise definition of the term without a long periphrasis as may be adhered to throughout this Act, this section should have been omitted altogether. Dr. Rash Behari Ghosh has remarked that "this section is not very happily worded." Mr. Justice Mahmood has suggested another wording (see I.L. R., 5 All. 121, F.B.).

Transfer.—In ordinary import it conveys the idea of only an absolute transfer amounting to a divestiture by the transferor of his right out-and-out in favour of the transferee followed by the possession of the latter as a necessary consequence. It is a technical term of law, and is used as a convertible term with "alienation," "conveyance," and "assignment." It may be safely taken that the word

"transfer" is used in law in the most generic signification, comprehending all the species of contract which pass real rights in property from one person to another. See in I. L. R., 5 All. 121 (F.B.), the opinion of Mr. Justice Mahmood, which accords with the view of law taken by the Calcutta High Court and the Privy Council.

In the following section.—The definition of "transfer of property" as is given in this section is confined to Chapter II. In 3.3, general definition of terms for this Act has been given. This section is headed by "transfer of property, whether moveable or immoveable," and "transfers of property by act of parties," consequently "transfer of property" has been defined by this section.

This section may be interpreted thus: "In the following sections 'transfer of property' means an act by which a living person conveys the whole or part of the right or ownership of property in present or in future, to one or more other living persons, or to this self and one or more other living persons, and 'to transfer property' is to perform such an act. Property also includes jura in re alsena, i.e., estates carved out of full ownership."

If is doubtful whether this definition of "transfer of property" may be adhered to throughout this Act. In s. 58 (a) "mortgage" has been defined as the transfer of an interest in specific immoveable property, and an interest includes any limited interest or restricted right. Cf. ss. 108 (j), 40, and from 10 to 34. In s. 54, sale is the transfer of ewnership, s.e., sale is the absolute transfer of property or is the transfer of the property out-and-out. In s. 105 lesss is a transfer of a right to enjoy such property, s.e., transfer of a limited interest, or carving out a qualified interest, known as an esize, from the full of ownership (see I. L., R., 8 All. 324). In ss. 118 and 122, the transfer of ownership is absolute. In s. 100, a charge does not transfer an interest in specific immoveable property, and in s. 39, right to receive maintenance is not the transfer of an interest in the property out of which the maintenance is to be paid.

In the eye of Jurisprudence, a mortgage or a lease is a species of what are known as jure in re aliena, i.e., estates carved out of full ownership.

## Section 6.

Of any kind. The right of worshipping a god or goddess and receiving a share of the offerings may be transferred only to a competent person within the line of succession (see 6 Bom. H. C. R. 298). See also L. R., 2 I. A. 145; I. L. R., 5 Bom. 386, and the authorities there cited; but the religious endowments cannot be transferred.—See I. L. R., 18 Mad. 387.

Any other law.—For an example, the Garo Hills Regulation 1882, S. 4; the Ajmeer Land and Revenue Regulation, 1877, S. 36,

Equity enforces the performance of agreements when such agreements are for value, and are not contrary to its own rules, or to public policy. A mere expectancy, therefore, as that of an heir at law to the estate of his ancestor, or the interest which a person may take under the will of another, who is living, also, non-existing property to be future acquired at a future time, as the cargo of a ship, or future stockin-trade to be brought on the mortgaged premises, is assignable in equity for valuable consideration; and where the expectancy has fallen into possession, the assignment will be enforced, subject to any question, as to the effect of the bankruptcy of the assignor intervening, while the expectancy has not yet fallen into possession.—Collyer v. Issaecs, 19 Ch. Div. 342.

Clause (a).—Chance or mere possibility or expectancy is not property, and cannot be transferred. Subject of property or right of property must be in essee in order to admit of valid transfer. A thing (corporeal or incorporeal) of the Roman Law means what is sensible or perceptible through the senses, and is opposed to acts of persons, and to facts or events, and in its extended sense, it includes right. A thing existing actually or potentially may be transferred by conveyance or contract. "Vested remainder" becomes property when the contingency is put an end to.—See I. L. R., 18 Cal. (P. C.) 164.

The right of a son or daughter or other heir of a person to inherit that person's property on his death is not an estate in remainder, or in reverson in immoveable property, or an estate otherwise deferred in enjoyment. It is neither a vested nor a contingent right, it is in the language of section 6, clause (a), of the Transfer of Property Act, the chance of an heir apparent succeeding to an estate or "a mere possibility, of succession" which cannot be transferred.—I. L. R., 30 Boma 304 (Abdool Hossin Mulla v. Golam Hosain Ally).

Clause (b).—A mere right of re-entry, apart from the remaining right of ownership, i. e., reversion, cannot be transferred except as provided. When an estate is carved out from the absolute ownership, the owner of the property still has the right of revesion, and that right can be the subject of a valid transfer: but a right of re-entry on breach of a condition is a distant contingency which may never happen, and consequently cannot be transferred except to perfect or complete the title of the person to be bound by the condition. A right like this can have no separate existence from the land, and is not a personal right.

Clause (0).—An easement or servitude is not a separable right of property from the dominant heritage. It is the right of using a subject owned by another, and that right is indivisible from the dominant tenement. It is in fact a necessary incident of the dominant, tenement and therefore must go with it.

"An easement may be defined to be a privilege without profit, which the owner of one neighbouring tenement hath of another, exist-

ing in respect of their several tenements, by which the servient owner is obliged 'to suffer or not to do' something on his own land, for the advantage of the dominant owner.

"The essential qualities of easements, properly so called, may be thus distinguished:—

"1st.-Easements are incorporeal.

"2nd .- They are imposed upon corporeal property.

"grd.—They confer no right to a participation in the profits arising from it.

"4th.—They must be imposed for the benefit of corporeal property.

"5th.—There must be two distinct tenements—the dominant, to which the right belongs; and the servient, upon which the obligation is imposed.

"6th.—By the civil law, it was also required that the cause must be perpetual."—See Gale on Eassment, 6th edition, p. 6.

Clause (d).—A right of personal enjoyment is inseparable from the person himself, and it is a necessary incident of his own person, which cannot exist without him. Therefore the grantee of the incident cannot transfer it. A decree enforcing a right of pre-emption, here-ditary priestly office, a kariama right, right of worshipping a goddess, ghatwali tenure, tarawad property, right of a sebist of paricharaka, religious endowments, inalienable raj, jewels used in worsnip, and all emoluments of a religious office cannot be transferred.—See I. L. R., 7 All. 107, 109; 5 All. 183; 10 Bom. 342; 9 Cal. 187; 4 Mad. 301; L. R., 8 I. A. 248; 4 Mad. H. C. 336; 3 Mad. H. C. 380; 6 Bom. H. C. 250; 9 Bom. L. R. 772.

Olauso (e).—This clause is necessary to keep down litigation and to prevent trafficking in litigation. Transfers of actionable claims are not absolutely invalid.—See notes under Chapter VIII. The right to complain of a fraud is not a marketable commodity (De Hoghton v. Money, L. R., 2 Cn. App. 169, Turner, L. 7.). See I. L. R., 18 Mad. 374 (Ramanija Ayvangar v. Narayana Ayyangar). If the purchase be contrary to public policy, then it is void (cf. section 23 of the Contract Act). There is no law of Champerty in India.

Clause (f).—Public office requires individual capacity and merit, and cannot be transferred. Salary of a public officer cannot be transferred by the act of parties, but may be attached and transferred by the civil courts under certain circumstances (cf. s. 60 (1) of the Civil Procedure Code). See I. L. R., 10 Cal. 677; 8 Cal. 732; 9 Born. 198, 6 Born. 298, 300; 16 Mad. 73, 146; 15 Mad. 389; 4 Mad. 391; 1 Mad. 235; 3 Mad. H. C. 380: 6 Mad. 70-79.

Clause (g).—Public policy requires this provision in order to maintain the dignity and prestige of the office.

Clause (h),—(s) Transfer becomes inoperative if it destroys the right of property by the transfer. Nullius propritas, i.e., things which are nobody's property cannot be transferred.—See 1. L. R., 2 Cal. 347; 4 Mad. H. C. 336; 7 Mad. H. C. 210.

- (2) Law does not further an illegal object, so the transfer is void. Any transfer for an illegal consideration is void.—See I. L. R., 2 Alk. 433; 6 All. 313; 11 Bom. 708; 3 Mad. 215.
- (3) Conveyance and contract require the mutual consent and power of seizin; hence, a minor, an idiot, who cannot contract under the Contract Act, cannot be transferee. See I. L. R., 20 Cal. 508 (Fatima Bibi v. Debnath Shah), where lease to a minor was held invalid. See also, I. L. R., 18 Cal. 259 (Mahamed Arif v Saraswati), and I. L. R., 13 Bom. 50, Cf. s. 136 of this Act,
- (4) An assignment made in fraud of the Bankruptcy Law falls under this clause. The word object in s. 23 of the Contract Act is not used in the sense of consideration. It means purpose or design (10 Cal. W. N., p. 755).

Clause (i).—See I. L. R., 5 All. (F.B.) 121 (Gopal Pandey v. Badri Nath), and the Calcutta cases cited therein, and I. L. R., 7 All. 511 (Durga v. Fhinguri). Occupancy-right is not per se transferable or nontransferable in Bengal, but it is so according to the local custom. See 7. W. R. (F.B.) 528; 20 W. R. 139; 22 W. R. (F.B.) 22; I. L. R., 3 Cal. 774; 4 Cal. 925; 9 Cal. 304 and 648.

## Section 7.

Competent to contract.—See Contract Act, s. 11, which runs thus:—

"Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."

It is to be remembered that one of the objects of this Act was to complete the Code of Contract Law, so far as it relates to immoveable property. See notes under s. 6, cl. (h) sub-cl. (3). See also 1. L. R., 9 Bom. 561; I. L. R., 8 Mad. 93.

Authorized to dispose of property not his own.—The following persons have limited right as regards disposal of property:—
(z) Hindu Widow; (2) Karta of a Hindu Joint Family; (3) Father under Mitakshara Law; (4) Administrators and in certain cases executors (Vide s. 90 of the Probate and Administration Act); (5) Guardians duly appointed by Court (Vide s. 29 of the Guardian and Wards Act); (6) Manager to the estate of a lunatic (Vide s. 14 of the Lunatic Estates Act) and (7) Trustees and ors. (Vide Indian Trust Act, ss. 11 and 12).

## Section 9.

Capable of passing.—A transferor cannot pass greater right than he himself possesses. See 6 Moo. I. A., p. 539; l. L. R., 7 Bom., p. 540; l. L. R., 7 Cal., p. 665; l. L. R., 11 Cal. 131.

Principle.—In this section both the principle as well as the rule of interpretation have been set in. The principle being that an unqualified transfer conveys all the interest which the transferor possesses and the rule of interpretation being that every grant is to be most strongly taken against the grantor.—Roy's Transfer of Property Act, p. 41.

Intention.—intention is to be gathered from the whole instrument.—Kalidas v. Kanhayalal, II C. 121 (P.C.).

Debt.—The word "debt" in s. 8, clause (3), is not used in the widest sense, for, if so, it would cover the judgment-debt which is excepted from the operation of s. 135. The word should be confined to such debts as fall within the general category of actionable claim.—Arunachsilam v. Subramania, 30 M. 235.

Notes.—Parol contracts in all cases, except where the Legislature has expressly provided for written contracts, are allowed in this country. See sections 54, 59, 107, 118, 123, 132, and notes under those sections. An actionable claim may be transferred without writing, but when passed into decree, that decree, like all other decrees, cannot be transferred without written instrument, or by operation of law.

## Section 10.

Note.—Ss. 10 to 17 have been enacted to encourage free alienation of property. It is an established rule, that where a condition is absolute restraint of alienation is annexed to a transfer, such condition is void (In re Rosher, L. R. 26 Ch. D. 801). So also in the case of Tagorev. Tagore (9 B. L. R. 377), their Lordships of the Privy Council said: "If, again, the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or rather as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize."

Exceptions.—Conditions in restraining alienations is valid in cases of lease where the condition is for the benefit of the lessor. But it is clear law in India, as in England, that a general restriction on assignment does not apply to an assignment by operation of law taking effect in insitum, as a sale under an execution. So also where there is no provision in the clease for foreiture, or of re-entry

on forfeiture, by reason of an assignment in violation of the provision of it, the condition was held to be void.—Golah v. Mathurs, 20 C. 273; See also Afram v. Durgs, 10 Ind. Cas. 489; Mahanands v. Saratmani, 14 C. L. J. 585.

Proviso.—This section merely excepts the general rule laid down in s. 8 of the Married Women's Property Act (III. of 1874), the particular case of a married woman, and does not give to a restraint upon anticipation any greater force than it had before the passing of the Act, but merely preserves to it the effect it had previously, leaving the Married Women's Property Act of 1874, and the decisions upon it untouched.—Hippolite v. Stuart, 12 C. 522. In the case of married women this restraint upon anticipation is an exception, established by equity in favour of married women, to the general rule of law, which regards conditions in transfers of property restraining alienation as null and void.—G. Gondion v. Venkatsha, 30 M. 378.

#### Section 11.

Note.—This is one of those sections which are founded upon the public policy which condemns any attempt to restrain the free disposition and circulation of property for the interest of commerce and general progress of society. A transferee who takes an absolute interest should not be restrained in his enjoyment or disposition of it by any condition inserted in it. Such incident is inconsistent with or repugnant to the main purpose of the transfer.—Chamru v. Sona, 14 C. L. J. 303.

Proviso.-It is not competent to a vend or to create rights unconnected with the enjoyment of land and to annex them to it. But for the improvement or the better enjoyment of one piece of land. restrictions may be imposed on the power to deal with an adjoining piece of land; and the restrictive condition need not be expressed to be for the beneficial enjoyment of immoveable property. In McLean v. McKay (L. R., 5 P. C. 327), the conveyance contained an agreement that certain land should never be hereafter sold, but should be left for the common benefit of both parties and their successors. The Privy Council, while holding the restriction on sale to be invalid, construed the other clause as separable and as an agreement on the part of the grantor to leave the land in the state in which it was at the time of the conveyance, for the advantage of the parties as adjoining owners. Even such a restriction may cease to be enforceable if the character of the property sold so change as to make the restriction absurd .- Sheppard's Contract Act. Note under s. 11.

As to the effect of such restrictions on transferce vide s. 404 infra.

#### Section 12.

Note,—It is one of the incidents of property that it shall vest in the assignees of a bankrupt for the benefit of his creditors, and this incident cannot be taken away by the author of the transfer. So the right of alienation is one of the incidents of the absolute ownership of property, and therefore, if an absolute transfer is followed by a condition or restriction limiting the right of alienation, the condition of restriction is wholly void.

It is an exception to the provisions of s. 3t whereby an interest can be created with condition superadded that it shall cease to exist in case a specified uncertain event shall happen. So it has been enacted also to safeguard the interest of the creditors who advanced money on the security of the property and whose interest will be defeated if the transferee be declared an insolvent.

#### Section 13.

Unborn person.—Transfer, to an unborn person is void under the Hindu and Mahomedan Law. The law of will among Hindus is analogous to the law of gifts, a person capable of taking under a will must be such a person as could take a gift inter vivos, and therefore must, either in fact or in contemplation of law, be in existence at the death of the testator, and therefore a gift to an unborn child, except in case of an infant in the womb, or an adopted son is void. And what cannot be done by a gift cannot be done by the intervention of a trust (Tagore Law Lecture by Mr. Agnew, p. 40). "The principle is the same in the case of a deed as in the case of a will, but the application is different by reason that the deed converts the property in the lifetime of the author of the deed, whereas, in the case of a will, the conversion does not take place until the death of the testator."—Griffiths v. Ricketts.

In cases where the Hindu and Mahomedan Laws are not applicable, the rule of English law as contained in this section is applicable. The principle underlying this section is known as the Doctrine of Double Contingency, i.e., "According to English law, while there may be a limitation in favour of unborn children, a remainder to the children of such children is v.id, for there cannot be "a possibility upon a possibility."

It has already been noted under s. 5 that under this act an interest in future can be created for the benefit of an unborn person. But such interest cannot be created unless a prior interest is also created in that property in favour of a person who is in existence at the time of transfer. But the condition of the transfer is (r) that the unborn person must be in existence at the time when the prior estate ceases; (x) that the unborn person must be given the whole of the remaining interest, and (z) that the transfer in favour of the unborn person after

the lifetime of one or more living persons at the date of transfer cannot be deferred to a longer period than is necessary for his attaining majority.—Vide s. 14 infra.

## Section 14.

Cf. S. 101 of the Succession Act.

Principle.—" A perpetuity is a limitation, tending to take the subject out of commerce, for a longer period than a life or lives in being, and twenty-me years beyond, and in the case of a posthumous child, a few months more, allowing for the term of gestation," Lewis on the Law of Perpetuity Chapter XII. "A perpetuity is a thing odious in law, and destructive to the commonwealth; it would put a stop to commerce, and prevent the circulation of the riches of the kingdom; and therefore is not to be countenanced in equity."-Tagore Law Lectures, 1881, pp. 37 and 38. "The chief inducements to a creation of perpetuities are the desire of preventing prodigality in our descendants, the desire of ruling after death and last, but not the least, family pride."-Mukherjee's Perpetuities, p. 17. But "The Rules against perpetuities in the English law while they are efficient for the purpose of preserving and guaranteeing the free circulation of property to the utmost reasonable extent, yet afford ample scope for that attention to personal and family exigencies which it is neither the policy of the laws, nor the interest of society, entirely to overlook."-Lewis on the Law of Perpetuity Introduction.

Minority.—It seems that in place of 21 years under the English law, the Indian Act substitutes minority (i.e., 18 years or 21 years as the case may be) plus the period of gestation.

Scope.—This section applies both to moveable and immoveable property. "But the English doctrine of perpetuities has no application in the case of executory devise by a Hindu or Mahomedan and the validity of disposition must be regulated by the Hindu and Mahomedan law as the case may be. Under Hindu law any provision for perpetual descent and for restraining alienation is void; vide Anantha v. Nagamtha, 4 M. 200." A. K. Roy's Transfer of Property Act. P. 53.

Exception.—The rule laid down in this section is not applica-, ble to transfer in perpetuity for benefit of public (Vide s. 17 infra).

## Section 15.

Note, -Cf. S. 102 of the Succession Act and illustrations given there.

Principle.—The interest being indivisible, the condition obliges nothing, and consequently the transfer is wholly void. This section is intended not to define the word "class," but only to lay

down a special incident of gifts to classes. If the gift to a class be split into portions, and allotted to some of the individuals of a class with regard to whom the gift does not fall, then that would be making a different will, and hence not allowable.

Applicability. - The rule in this section is the rule of construction and not like the rules in the last preceding sections a rule of policy (Shep, and Brown, 6th Edition 83). But the proposition that a gift must fail in its entirety, because effect cannot be given to a part of it, and that some person or persons whom the donor never intended to benefit should receive the entire property covered by the gift to the exclusion of all the intended donees-is repugnant to Hindu notions, as it also obviously defeats the intention of the parties. As there is no rule of Hindu law that a gift inter vivos or a bequest to a class of persons some of whom are incapable of taking by reason of the rule that the gift is valid only if it is made to a sentient being capable of taking, is void also as regards those who are sentient and capable of taking, so the analogy to the English law does not hold good in such a case, as it is based on peculiar rules inapplicable to Hindus. Bhagabeti v. Kali, 32 C. 992 (F.B.) = 9 C. W. N. 749=1 C. L. J. 489.

Exception.—This section is not applicable in case of transfer in perpetuity for benefit of public.

## Section 16.

Note.—Compare s. 103 of the Indian Succession Act.

Principle.-This section seems to be based on the old doctrine that "there cannot be a possibility upon a possibility in the creation of a contingent remainder, and it is in accordance with the rule of English law to the effect that, where devise is void for remoteness, all limitations ulterior to or expectant upon such devise are also void, That is to say, where a prior gift is void, the ulterior gift which is intended to take effect on failure of, or postponed to such void gift, must also be void, for one is dependent on the other."-Mojumdar's Hindu Wills Act, pp. 377-378. "But where the ulterior gift is not intended to follow upon as above, but is intended to be made in substitution for the prior gift, and one of such gifts is too remote and invalid and the other is valid and capable of taking effect, the Court will disregard the invalid one and give effect to that which is legal, if the event on which it is limited occur or which the same thing, if the ulterior gift is to take effect upon either of two contingencies, one of which is within and the other not within the prescribed limits, and the former contingency happens to occur, the ulterior gift will take effect the other contingency being disregarded."-Ibid p. 378.

Exception.—The rule laid down in this section is not applicable in cases of transfer in perpetuity for benefit of public.—Vide s. 17. infra.

## Section 17.

Scope.—This section does not affect any rule of Hindu or Mahomedan Law. The transfer in perpetuity must be bona fide, and not mere an ostensible or colourable transaction for the maintenance of the family of the donor. The transfer must be out and out. Complete dedication, and not merely spes Successionis in a distinguished form, can constitute valid transfer under this section.

Hindus, etc.—This section also does not affect any rule of Hindu, Mahomedan or Budhist law.

Benefit of public.—A transfer, to be valid as a transfer for charitable uses, and not offending against the rule of perpetuities, must be a transfer for the benefit of the public generally, or of some section of the public, but not private charity, or for the benefit of a private company. Charities are highly favoured in law, and this section expressly excepts transfer for charitable uses from the restrictions imposed upon transfers under ss. 14, 15 and 16. This section has refrained from using the expression "charitable uses," but has enumerated some of the Acts of charity. What is known as charity under the English Law is not necessarily so in India. See I. L. R., 20 C. 116 (F.B.).

Advancement of religion.—Transfer for the propagation of religious doctrines of the various sects, for ministers of religion, for the repairs of a church, are valid.

Any other object.—The courts are to pronounce whether any particular object of a bounty falls within the definition of charities and objects useful and beneficial to the community. But they must, in such a case, in general, apply the standard of customary law and common opinion amongst the community to which the parties interested belong. Objects which the English law would possibly regard as superstitious uses, are allowable and commendable according to the Hindu law, and not less so according to the Mahomedan Law. A trust for the maintenance of an idol, it has been held, is one for a public charitable purpose amongst Hindus; and unless an arbitrary criterion is to be employed, it seems impossible to say that a trust for the benefit of the poor, for aiding pilgrimages and marriages and for the support of wells and temples is not, amongst Mahomedans, a charity within the definition even according to the principles of English law.—Vide Fatmabibi v. The Advocate-General, Bombay, 6 B. 42.

The following are the various charitable objects enumerated by Statute 43 Eli. 2 C. 4: relief of aged, impotent, and poor people; maintenance of sick and maimed soldiers and mariners; schools of learning, free schools, and scholars of universities; repair of bridges, ports, havens, causeways, churches, sea-banks and highways; education and preferment of orphans; towards relief, stock or maintenance for houses of correction, marriages of poor maids, relief or

Trans. Pro. Act. -2.

redemption of prisoners or captives, aid for ease of poor inhabitants in payment of certain taxes. Among gifts for objects not comprised in the above enumeration, but which have been held charitable, are the following, viz., gifts for widows or orphans or the poor of a place, for building or endowing a hospital, for the erection of waterworks, towards payment of the national debt, for the encouragement of the good servants, for deserving litarary men, who have been unsuccessful, and for educational purposes: A gift in favour of the parish or of the parishioners has also been held to be charitable. But allowance is to be made even for Englishmen in circumstances in which particular English Laws from their specially local or historical character become obviously inapplicable,—Fatama v. Advocate-General of Bombay, 6 B, 42.

Doctrine of cypres.—Where a charity is so given that there can be no objects, the Court will order a different scheme to be laid before it, according to the doctrine of cypres, i. e., original purposes. In the case of charitable transfers, where from the objects being uncertain, or the transferees not being in esse, or the transfer being incapable of being carried into exact execution, or for other like causes, a literal execution becomes inexpedient or impracticable, the Court will carry out the intention as nearly as it can according to the original purposes, or as the technical expression is, cypres.—See Theobald's Law of Wills.

Principle.—The principle of law is that ownership cannot be kept in abeyance—there cannot be any property without an owner.—See Mukherjee's Tagore Law Lectures on Perpetuities, p. 346, and s. 104 of the Indian Succession Act. But that s. 104 does not apply to Hindu Wills. Therefore it is not incompetent for a Hindu to direct accumulation under certain circumstances.—Amrito v. Surma, I.C. W. N. 345=24 C. 589.

Section 18.

See Rajendra Lall Agarwalla v. Raj Coomari Dabi (11 C. W. N. 65), Mr. Justice Harington has observed thus at p. 70:-

"No hard-and-fast rule therefore can be laid down. In each case the particular direction must be examined to see whether the object the testator desired to effect was illegal, or whether the effect of carrying out the direction would be to bring about a state of things inconsistent with the Hindu Law, or whether the direction to accumulate is so unreasonable in its nature as to be void as against the public policy of the realm.

"For example, if the object of the direction to accumulate were to create a perpetuity, it would be void—if the effect were to make a gift in favour of a donee in future with no gift in præsenti, the direction to accumulate would be illegal, being inconsistent with the Hindu Law of gifts. It is easy to imagine a direction to accumulate, which, because of the length of time for which the monies where to be accumulated, or the

excessive sum to which the accumulations were to amount, or other reasons, might be held to be void as against public policy.

"In my opinion, the inference to be drawn from the judgments in the case of Amrito Lall Dutt v. Surno Moyee Dassee (t C. W. N. 345) and the cases discussed in Jenkins, F.'s judgment in the Court of first instance is that there is nothing per se illegal in a direction to accumulate made by a Hindu, and that, if such a direction is neither so unreasonable in its conditions as to be void as against public policy nor given for the purpose of carrying out an illegal object, nor in its effect inconsistent to Hindu Law, it should be given effect to."

When accumulation is allowed.—This Act only allows accumulation (1) where the property is immoveable, and (2) where the accumulation is directed to be made from the date of the transfer. But then it must end within one year from the date of transfer. So where in the case of moveable it does not start from the date of the transfer but from some subsequent date in that case the direction is invalid even though the period, during which the accumulation is to take place, may end within one year from the date of transfer. In the case of immoveable however the period of accumulation may or may not start from the date of transfer, but it must end within one year from the date of transfer, In computing the period of one year from the date of transfer, the day on which the transfer takes place is to be excluded.

#### Section 19,

Note. This section is same as s. 106 of the Act X. of 1865.

Principle.—The provisions of this section, and of s. 106 of the Succession Act, like the English Common Law, lean in favour of early vesting of estates transferred. The effect of this principle is that property which is the subject of transfer will belong to the transferee immediately on the instrument taking effect, or so soon afterwards as the transferee comes into existence, or the terms thereof will permit, so that the property may not lapse. But property once vasted may also be divested, as when there is a present right to the property, defeasible on the happening of a particular event, e. g., where there is a transfer to an infant on condition that the property will go over to some other person in the event of his dying under eighteen, in which case the infant has a vested interest subject to be divested on his death under age.

Vested interest.—The word vested is sometimes used in the sense of payable, as when the shares of members of a class are directed to be vested at a particular time, and there is a transfer over to the other members of the class of the sharers of those dying before that time without issue.

A vested interest is transferable and heritable; but a contingent interest is not so. See I. L. R. 5 Cal. 59 (Ellokassee Dassee v.

Durponarain); 9 Moo., I. A., p. 123; 9 B. L. R. 399; I. L. R., 13: Bom. 463.

Difference between vested in interest and vested in possession.—There is a distinction between vested in possession and vested in interest. Where a transfer is made in general terms without specifying the time when it is to take effect, the transferee takes an immediate vested interest which is said to be vested in possession, that is to say, there is a present right to the immediate possession or enjoyment of it. Where there is a present indefeasible right to the future possession or enjoyment of an interest in property, that interest is termed vested in interest only, but not vested in possession. See 10 C. L. R., 207 and I. L. R., 6 All. 583, and 4 Cal. 304 (Maseyk v. Fergusson).

Contingent interest.—In contingent interest, the transferee is neither given the present title or present right of enjoyment but both depend upon the happening of some future uncertain events.

Explanation.—Vested interest is also created in the following four cases;—(1) where a provision is made whereby present enjoyment is postponed; (2) or where a provision is made whereby a prior interest in the same property is given or reserved to some other person; (3) or where a provision is made whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or (4) where a provision is made to the effect that if a particular event shall happen, the interest shall pass to another. In cases (1), (2) and (3) the property is indefeasibly vested in the transferee but in (4) the interest of the transferee is conditional.

An interest is indefeasibly vested when although actual enjoyment may be postponed, the donee has acquired a proprietary right to it which is not subject to any condition, either precedent or subsequent, unless, therefore, the interest is restricted to the life of the donee it is transmissible on his death. An interest is conditional when it is either contingent or vested subject to be divested.

A contingent interest is one in which the donee takes no proprietary interest at all, unless and until some specified event happens. Such a condition is called a condition precedent. A contingent interest is only transmissible on the death of the donee when the condition is not personal to him, and is capable of being performed by his sequels in title.

An interest is vested subject to be divested when there is no condition precedent to vesting, but the interest is to be taken away from the donee in certain events and given to another. Such a condition is called a condition subsequent. An interest vested subject to be divested is transmissible on the death of the donee, unless the divesting condition takes effect,—Underhill and Strahan, p. 252.

In the last case of the explanation the interest is vested subject to be divested.

#### Section 20.

Note.—Ss. 13 and 14 also create interest in favour of unborn person. Property cannot be vested in any one who is not in esse, but it becomes vested when he comes into existence, in the absence of any contrary intention in the terms of the transfer.

#### Section 21.

Cf. S. 107 of the Indian Succession Act.

Note.—On the fulfilment of the condition precedent a contingent interest becomes a vested one.

Exception.—This is based on the theory that "where the principal is given at a distant epoch and the whole income is given in the meantime, the Court learning in favour of vesting was said that the whole thing is given, but if there occurs an interval or gap, which separates the gift of the interest from the principal, it is not vested."—Pearson v. Dolman, L. R. 3 Eq., 315 (321).

#### Section 22.

Vide s. 108 of the Indian Succession Act.

Note.—There is a great distinction between transfer to a class on a contingency and transfer to a contingent class. In the former the class is ascertained at the date of the transfer, but in the latter case the class is uncertain. Thus a transfer to such children as shall have attained 18 is a transfer to a contingent class, and no child who has not attained that age can have a vested interest, because, until he attains the age of 18, no child completely answers the description of those who are to be transferees.—See I. L. R., & Cal. 218.—(Ballin v. Ballin).

Where time, i.e., the attainment of a particular age, is the essence of the transfer, then, until that age is attained, no interest becomes vested. But, where time of payment and the transfer are distinct, and independent of each other, then the transfer is clear and the interest becomes at once vested.

## Section 23.

Note. - Cf. s. 111 of the Indian Succession.

Principle.—The property must vest on some one. It cannot remain in abeyance. So it is based on public policy.

Application of s. 111 of the Indian Succession Act.—This section applies only where the prior bequest is capable of taking effect and is not ab intitio void.

## Section 24.

Note .- Vide s, 112 of the Indian Succession Act.

Here, transfer is made to some unascertained, yet certain persons, who will be ascertained after the lapse of the given period

Hence, until the arrival of that given period, exact transferees are not ascertained, and the property or interest does not vest in anybody.—See Nundi Singh v. Sita Ram, L. R., 16 I. A., p. 44.

## Section 25.

Vide ss. 113 and 114 of the Indian Succession Act.

Note.—When a condition is illegal or impossible of performance otherwise than by reason of the acts or defaults of the donee, then if it is a condition precedent the gift is altogether void; but if it is a condition subsequent, the first gift is indefeasible, and only the gift over is void. This is the distinction between condition precedent and condition subsequent.

#### Section 26.

Note. - Vide s. 115 of the Indian Succession Act.

Substantially.—See the doctrine of cypres as expounded in notes under s. 17. Fulfilment of conditions in substances, that is, according to the original intentions of the transferor, is sufficient performance under this section. Where literal performance becomes impossible or impracticable by reason of the death or insanity of some of the persons whose previous consent to the marriage of the transferee is imposed as a necessary condition to the accrual of a legacy, then the consent of the survivor is sufficient fulfilment. Where time is not the essence of a condition, fulfilment of the condition in a reasonable time is sufficient compliance. Where consent of the guardian or executor is imposed as a necessary condition, and if the transferee succeeds in getting the consent of the testator or of the transferor himself, then it is sufficient compliance. Substantial effect of the condition imposed, and the real interests of the transferor on the fulfilment of conditions, are the tests of substantial compliance. Illustration (a) to s. 115 of Act X. of 1865 elucidates the principle that silence, under certain circumstances, is equivalent to consent, or in other words, the maxim, qui tacit, satis loquitur applies.

## Section 27.

Vide ss. 110 and 117 of the Indian Succession Act.

Note,—The second paragraph qualifies to a certain extent the first paragraph. And it applies to both in cases of moveable and immoveable property,—Radha v. Ranee, 33 C. 947.

## Section 28.

Note.—Vide s. 118 of the Indian Succession Act. Here the condition is condition subsequent. A precedent condition may be substantially complied with but the subsequent condition must be strictly fulfilled.—Vide s. 29 infra.

#### Section 29.

Note .- Vide s. 119 of the Indian Succession Act.

## Section 30.

Note.—Vide s. 120 of the Indian Succession Act. See Note under s. 25.

# Section 31.

Note.—Vide s. 121 of the Indian Succession Act. This section explains what a condition subsequent is.

## Section 32.

Note.-Vide s. 122 of the Indian Succession Act.

As to the effect where the condition subsequent is illegal, Vide Notes under s. 25 supra.

#### Section 33.

Note. - Vide s. 123 of the Indian Succession Act.

If the transferee renders impossible, or indefinitely postpones, the doing of an act for which no particular time is specified, and upon the non-performance of which the transfer is to cease to have effect or go over to another, the transfer will go as if the transferee had died without performing the act.

## Section 34.

Note—Cf. s. 124 of Act X. of 1865, It is a principle of equity that ignorance of a condition annexed to a gift or transfer by will or deed does not protect a legatee or transferee from the consequences of not complying with the condition. But it is otherwise in the case of fraud on the part of the person to be directly benefited by non-fulfilment of the condition.

As regards fraud, see notes under s. 78.

## Section 35.

Principle.—Election has been defined as "the choosing between two rights where there is a clear intention that both were not intended to be enjoyed. The foundation of the doctrine is the intention of the author of the instrument, and its characteristic is the effectuation of a gift made by a donor of property not belonging to him (Dillon v. Parker). It is a principle of Equity, that a person, who accepts a benefit under an instrument, must accept the whole, whether favourable or unfavourable, giving full effect to all its provisions, and must at the same time renource all rights inconsistent with it. Although no one is entitled to transfer by any instrument any property which does not belong to him. But by virtue of this doctrine, he may in effect transfer property belonging

to others. The transferor must confer some benefit upon the owner of the property, and the latter must elect either to confirm the transfer or to dissent from it. So, as has already been said, he who accepts a benefit under an instrument must confirm to the whole contents of the instrument, and must renounce any right inconsistent with it.—Theobald's Law of Wills.

Requisites of election.—In order to raise a case of election two essential circumstances must concur, vis.:—

- I.—Property which belongs to one person A must be given to another by the author of the instrument,
- II.— The donor must at the same time give property of his own to A.

In such a case of concurrence, A will be put to his election, and will have two courses open to him—

- (1) Election under the instrument and consequent submission to all its terms.
- (2) Election against the instrument, in which case the question arises as to whether compensation or forjeiture on the part of the refractory donee is to result. Equity sequesters the benefits intended for the person electing against the instrument in order to compensate him whom this election has disappointed, and the surplus, after compensation, is restored to the refractory donee.—Snell's Equity.

Effect of Election.—The effect of election under the Indian law is forfeiture *i.e.*, the transferee electing against the instrument forfeit the benefit thereunder and the benefit revert to the transferor, who is to compensate the disappointed person. But according to English law, equity sequesters the benefits intended for the person electing against the instrument in order to compensate him whom his election has disappointed, and the surplus, after compensation, is restored to the refractory dones.—Snell's Equity.

Election how determined,—Election is a question of intention, and may be implied from circumstances. If a person bound to elect has died soon after the transfer, the Court, in the absence of evidence, in deciding whether there has or has not been an election, will be influenced by the consideration whether it was for the benefit of the person entitled to elect or disclaim. See I. L. R., 12 Cal. 60 (Pramada Dasi v. Lakhimoni Mitter).

A transfer for a man's benefit, as for the payment of his debts, is for the purpose of election, the same thing as a transfer made to himself.

A person taking no benefit directly under the transfer, but deriving benefit indirectly, or enjoying a derivative interest, is not put to his election.

As regards infants, incapable of electing, an enquiry should be made whether it is to the advantage of the infant to elect or disclaim.

—Cf. s. 177 of the Indian Succession Act.

A release of a debt due from a third p erson to a transferee will put the transferee to his election if a debt of his due to the transferor be released by the instrument of transfer.

#### Section 36.

Note.—This section has been borrowed from the Apportionment Act, 1870 (33 and 34 Vict. c. 35) s. 1.

The Act 4 and 5 Will. IV. c. 22 for the apportionment of rents does not appear to apply to the case of a sale; or, as between vendor and purchaser, to affect the latter's right to accruing rents. By the Apportionment Act, 1870, 33 and 34 Vict., c. 35, "all rents are, like interest on money lent, to be considered as accruing from day to day, and are made apportionable in respect of time accordingly; but the Act expressly provides that the person liable to pay the rent is not to be resorted to for an apporti onment-part; but the entire rent is to be paid to the person who would have been entitled to receive it if not apportionable; and the right to an apportioned part is to be enforced against him, not against the tenant. The language of the Act is certainly wide enough to include an apportionment of rent as be, tween vendor and purchaser, but the point has not as yet been expressly decided.

Transferor and the transferee.—This rule is only binding upon the parties to the transfer.

Apportionment of rent.—See I. L. R., 21 Cal. 383, Satyendra Nath Thakur v. Nilkantha Singha.—Held by Norris and Banerjee, FF, that "rent should, in our opinion, ordinarily be regarded, not as accruing from day to day, but as falling due only at stated times according to the contract of tenancy or the general law, in the absence of such contract, as laid down in section 53 of the Bengal Tenancy Act, &c. S. 36 of the Transfer of Property Act has no application to a case like the present for two reasons—first, because, by section 2, clause (a), of the Transfer of Property Act, s. 30 does not apply to execution-sales; and, secondly, because the apportionment of rent that that section contemplates is one following the transfer of the interest of the person entitled to receive the rent, and not the transfer of the interest of the person bound to pay it."

The provisions of s. 2, clause (d), bars the operation of s. 36, Transfer of Property Act, relating to apportionment of rent to a transfer of property by operation of law. The provisions of s. 2, clause (d), bars the application of s. 36 relating to apportionment of rent with regard to a transfer of property by operation of law. Satyendra Nath Tkakur v. Nilkantha Sinha (I. L. R., 21 Cal. 383) and Lakshmina-

ruappa v. Melothraman Nair (I. L. R., 26 Mad. 510) referred to.— Mathewson v. Shyam Sunder Sinha, I. L. R., 33 Cal. 186.

#### Section 37.

Note.—The saving clause was introduced by the Select Committee, who thought this section might possibly sometimes cause hardship to the agriculturists, who were the least able to help themselves.

Cf. s. 50 and s. 131 of the Act.

The duty of a tenant to pay rent to several co-sharers of the landlord may be severed, and, if the tenant withholds payment from any fractional sharer, the latter may recover his share by suit framed according to the law and practice. See I. L. R., 19, Cal. 735; 5 Cal. 901, 942; 4 Cal. 350, 556; 11 Cal. 738, 221; 14 Cal. 201; 7 Cal. 15; 12 Cal. 555; 10 W. R. 441; 22 W. R. 394; 21 W. R. 46.

If the mortgagee's interest be divided among several persons, the corresponding duty of the mortgagor to repay the loan to those several persons cannot be severed, and hence a fractional co-sharer of the mortgagee's interest cannot claim his share of the money separately.

Provision has been made for the protection of the tenant, but it does not give to the payee the right to retain money so paid, or debar a suit by the peson entitled to the money to recover it.—See I, L. R., 23 Cal. 101.

Section 38.

Note.—Chapter II., has been subdivided into two parts, vis., A and B. A contains from 5 to 37, altogether 33 sections which are applicable to moveable as well as to immoveable property. B contains from 38 to 53, altogether 16 sections which are applicable exclusively to immoveable property.

Any person, such as a Hindu widow, having power of alienation only under special circumstances, such as for the liquidation of her late husband's debts, for pilgrimage to Gaya to perform her husband's shrad ceremony, for her maintenance, or for any other legal necessity which is recognized under the Hindu Law, can transfer such property for consideration alleging the existence of those special circumstances such as legal necessity, and the bond fide purchaser or mortgagee or lessee for value will be protected under this section, if he used reasonable care to ascertain the existence of the alleged legal necessity, and then an unrebuttable presumption will arise in his favour as to the existence of the alleged legal necessity. See I. L. R., 21 Cal., page 100, and the unreported case, the judgment of which has been quoted in page 190 of the same. It was there held; "In the case of an alienation by a Hindu widow of her husband's property, on the ground of legal necessity, the alience is sufficiently protected if he satisfies himself by bond fide enquiries of the existence of such necessity,

although he may be in fact mistaken. He has not to see to the application of the money." In I, L. R., 11 Bom. 320, Mr. Justice Westsays, "she (i.e., the widow who transferred for legal necessity) acts fairly to her expectant heirs "(ie., reversioners), and this has been quoted and followed in I. L. R., 18 Bom., page 534. See also I. L. R., 13 Mad. 189; 11 Bom., page 320 and page 325; 2 Bom. 67; 14 W. R. 147; 6 Bom. (A. C.) 270.

See Raja Rai Bhagwat Dayal Singh v. Debi Dayal Sahu (7 C. L. J. 335, P. C., January 1908). One who claims title under a conveyance from a woman, with the usual limited interest which a woman takes, and who seeks to enforce that title against reversioners, is always subject to the burden of proving, not only the genuineness of his conveyance, but the full comprehension by the limited owner of the nature of the alienation she was making, and also that that alienation was justified by necessity, or at least that the alienee did all that was reasonable to satisfy himself of the existence of such necessity. And this burden lies the more heavily on one who comes into Court with the case that he did not take from a limited owner, but from one whose title he alleges to have been adverse to that owner.

## Section 39.

The Right to receive Maintenance and Charge upon Property.—The maintenance of a Hindu widow is not a charge upon the estate of her deceased husband until it is fixed and charged upon the estate by a decree or by agreement; and the widow's right is liable to be defeated by a transfer of the husband's property to a bond fide purchaser for value even with knowledge of the widow's claim for maintenance, unless the transfer has further been made with the intention of defeating the widow's claim.—Ram Kunwar v. Ram Dai, I. L. R., 22 All. 326, and The Bhartpore State v. Gopal Dei, I. L. R., 24 All. 160.

In order to claim the benefit of this plea the defendant must show, first, that he is a purchaser according to the proper meaning of that term; second, that he is a purchaser bond fide; and, third, that he is a purchaser for valuable consideration. Now, what is the meaning of the term "purchaser?" It cannot be a person who purchases a mortgage as a mortgage, because that would be merely equivalent to an assignment of a mortgage. It, therefore, must mean, in their Lordship's opinion, "some person who purchases that which de facto is a mortgage upon a representation made to him, and in the full belief that it is not a mortgage, but an absolute title."—See 18 W. R. 166 (Ram Coomar Coondoo v. McQueen): I. L. R., 18 Cal. 197 and 198 (Kishory Mohun Roy v. Mahomed Mujaffar Hossein); 19 W. R. 294, P. C. (Luchmun Chunder Geer Gossain v. Kali Charan Singh).

The last part of this section—"nor against such property in his hand"—is very important. This section lays down distinctly that, though the rights of a purchaser may be affected by notice, yet a

person purchasing from him bona fide and without notice will not be bound by it, and similarly, a person served with notice may safely purchase from a bona fide purchaser without notice. The concluding portion of this section lays down the principle that a bona fide purchaser without notice should be able freely and completely to dispose of the property innocently acquired by him, or, in other words, the property would be safe in his hands. In the same way a subsequent purchaser with notice, however remote, will be protected. The bona fide purchaser for value without notice purges away equity from the estate in the hands of all persons claiming under him except the original unconscionable purchase with notice.—See I. L. R., I Bom. 237; II Bom. 272; Sugden's Vendors and Purchasers, pp. 395, 753.

### Section 40.

Note.—Compare s. 108, Exception 2, of the Indian Contract Act: "If one of several joint-owners of goods has the sole possession of them by the permission of the co-ownership the ownership of the goods is transferred to any person who buys them of such joint-owner in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods has no right to sell them."

An interest in immoveable property is a right in re-aleina, is a restricted right carved out of the full ownership. A right to restrain the owner from enjoying or using his property in a particular manner has no connection with the ownership of the property, and is not an interest in the property.

A personal contract and a covenant running with the land are quite distinct from each other.—See I. L. R., 2 All. 162.

A mere contract for sale of immoveable property conveys no interest in it, but it confers a right upon the contractee to compel the contractor, as well as any subsequent purchaser of the same property with notice of the contract, to specifically perform the contract for sale.

—See I. L. R., 9 Mad. 119. See also I. L. R., 4 Cal. 402 (P.C.), and 4 Cal. 897.

### Section 41.

Note.—This section is apparently based upon the principle of estoppel as has been enunciated in s. 115 of the Evidence Act, and has for its origin the remarks of their Lordships of the Privy Council in the case of Ram Coomar Koondu v. McQueen (11 B. L. R. 52), where their Lordships have observed: "It is a principle of natural equity, which must be universally applicable that, where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can everthrow that of the purchaser by showing, either that

he had direct notice, or something that amounts to constructive notice, of the real title; or that there existed circumstances which ought to have put him upon an enquiry that, it prosecuted, would have led to a discovery of it."

### Section 42.

See notes under s. 53, and Twyne's case, 1 Smith's Leading Cases, p. 1. This section has been borrowed from the Statute 27 Eliz., c. 4.

See I. L. R., 12 Mad. 60 (Cooling v. Sarazana), where it has been remarked that, "in the absence of a special provision of law, we do not see how a bona fide purchase can operate to secure a larger interest than the vendor himself had and was competent to transfer."

### Section 43.

In the English law, on the subject of title by estoppel, positive, clear, and unambiguous statement by the covenantor that he had the legal estate is necessary, while, in this country, under this section, mere profession and representation will suffice to create a title by estoppel, But this right cannot be enforced against "a bond fide purchaser for value without notice."—See I. L. R., 7 All. 864; 20 Cal. (P.C.) 296. By this section "a false and fictitious statement is made to have the effect of truth."

Erroneously represents,—Misrepresents or represents through mistake. Representation by the covenantor is an essential element in the creation of a title by estoppel. This section does not apply in the case of sale through Court: I. L. R., 4 Cal. 677, Alukmones Dabee v. Banee Madhub. A bare representation without any intention to defraud is sufficient to create a title by estoppel.—I. L. R., 7 All. 864, Radhey v. Mahseh.

Contract of Transfer subsists.—As long as the relation of contractor and contractee endures or continues. If the transfer be by way of sale, then, as long as the purchase-money is not returned by the vendor, the relation may be said to subsist. If the transfer be by way of mortgage, then the relation may be said to subsist until the mortgage is satisfied.

# Section 44.

Note.—It has been settled that a purchaser of a specific portion only of joint property from a co-owner can bring a suit for partition in respect of the share purchased, although the seller can have no right of partition of a part only of joint property.

Under the Partition Act of 1894, provision has been made for the partition or effectual enjoyment of a portion only by a co-sharer of a common dwelling house.

A purchaser from a member of an undivided family of that member's share in a specific portion of the ancestral family-property

cannot sue for a partition of that portion alone, and obtain an allotment to himself by metes and bounds of his vender's share in that portion of the property.—I. L. R., 13 Mad, 275. Venkatorama v. Meera Labai.

See I. L. R., 5 Bom. 504, Balaji Anant v. Ganesh, 11 Bom. H. C. Report, p. 72 (Pandurang v. Bhaskar).

#### Section 45.

Scope.—It is a general principle of law that partners are interested equally in all partnership property or in property jointly acquired. But where their share in the joint fund is known, they are interested in the property proportionately to their interest in the fund. So also where consideration is met from separate fund their share is proportionate to the contribution they have made. This section only lays down the rule as to the quantity of interest acquired by each of the joint purchasers. But it has nothing to do as regards the question whether such purchasers, are joint tenants or tenants in common.—See A. K. Roy's, Transfer of Property Act. The last protion of this section is very important. It determines the onus in case of dispute regarding the quantum of interest of joint purchasers.

#### Section 46.

Scope.—This section and section 47 are correlative to section 45.

This section provides for the cases where the *entire* property is transferred, but in cases of transfer of a part only, section 47 will apply.

Distinct Interests.—If the interest of the transferors be not distinct or specific, then, in the absence of evidence as regards the extent of their respective interest, they are entitled to share equally. On this point the section is silent.—Pal's Transfer of Property.

# Section 47.

This section is correlative to s. 45, and complementary to s. 46. See notes under ss. 45 and 46.

It is to be noted that the transfer takes effect on the shares according to the extent of interest of each transferor, but not according to the quantum of consideration taken by each of the several transferors.—Pal's Transfer of Property.

# Section 48.

Notes.—The maxim of equity is: "Qui prior est tempore, potior est jure," i. e., where equities are equal, the first in time shall prevail. See notes under section 39.

As to priorities of mortgages, see ss. 78 and 79.

Exceptions to this general rule are to be found in (t) s, 50 of the Registration Act, which, under certain circumstances, provides for a

registered mortgage to have priority over an earlier unregistered security. (2) salvage lien, that is, advances made for the purpose of protecting a property from forfeiture of destruction.

See Itcharam v. Raiji (2 Bom. H. C. R., p. 41) and I. L. R., 7 Bom. 662 (S. B. Shrengarpure v. S. B. Pethe).

See I. L. R., 8 Cal. 597, F. B. (Narain Chander Chuckerbutty v. Dataram Roy), which allowed prioriy of a registered conveyance over an unregistered prior conveyance accompanied by possession of the property conveyed. But it is otherwise when the question arises between a registered transfer and a prior parol transfer accompanied by possession. Cf. I. L. R., 10 Cal. 250 and 710, and see notes under ss. 53 and 40.

Priority may be forfeited by fraud, misrepresentation, and gross neglect. See notes under ss. 3, 78, and 39; I. L. R, 7 All. 572, per Mahmud, J. (Sirbadh Rai v. Raghunath), and 8 All. 409 (Karamat v. Samiuddin, 8 All. 86).

See page 942 of the "Vendors and Purchasers" by J. Henry Dart, Vol. II., 6th edition:-

"Where the purchaser has neither taken a conveyance of the legal estate, nor taken such a conveyance of the equitable estate as would seem to give him an absolute and indefeasible right to call for the legal estate the ordinary rule of equity, ' Qui prior est tempore, potion est jure,' will be allowed to operate in favour of and adverse claimant having in other respects an equal equity. In a case in which, the prior authorities were fully reviewed, the rule was thus stated: 'As between equitable incumbrancers, relief will be given to the incumbrancer prior in point of date unless he has lost his priority by his own act or neglect, and relief will not be refused him, as against a subsequent incumbrancer, on the sole ground of the latter being a purchaser for value without notice, unless he has the legal estate, or the best right to call for it.' Thus, where a mortgagee lent money upon a conveyance of what he knew to be a mere equity of redemption, it was held by Lord Thurlow that he must be postponed to mesne incombrancers of whom he had no notice; and the decision has been several times recognized by lord Eldon. So, where bankers took an equitable mortgage by deposit of title-deeds of an estate which was subject to a secret trust of which they had no notice, it was held that such trust must prevail against their security: so a purchaser of legacy takes subject to the liability to refund for payment of debts: and, as a general rule, the purchaser of an equitable chose in action takes it subject to all prior equities; and the rule applies even in cases where the purchase is made in market overt, and in the ordinary course of business; but a prior incumbrancer seeking the aid of equity against a bond fide purchaser without notice should be prompt in his proceeding .- Pal's Transfer of Property.

#### Section 49.

Note—The contract of insurance against loss or damage by fire is a contract of indemnity against actual loss, and if the transferor receives any insurance money, he receives it as a trustee for the actual sufferer. He cannot retain the insurance money against the transferee who alone has the real and substantial interest in the money which ought to be laid out in restraining the property insured.—Pal's Transfer of Property, p. 18.

### Section 50.

Note.—See I. L. R., 23 Cal. 101, where it has been remarked that provision has been made for the protection of the tenant, but it does not give to the payee the right to retain money so paid, or debar a suit by the person entitled to the money to recover it.

### Section 51.

"Where a purchaser for value is evicted in equity under a prior title, he will be credited with all moneys expended by him in necessary repairs or permanent improvements, except improvements made after he has discovered the defect of title."—Dart's Vendors and purchasers, sixth edition, p. 1032.

### Section 52.

Note.—The doctrine of law commonly termed as the doctrine of lis pendens is enunciated in this section.

Active prosecution.—It does not mean that lis pendens wilt not apply in expartee decree, but it means "lis pendens takes effect from the service of summons" (15 C. 547; 12 M. 180). An appeal is regarded as a continuation of the lis so as to bind a purchaser (15 C. 94).

Object.—The aim of lis pendens is to prevent multiplicity of suits. This distinction between lis pendens and res judicata is this to constitute litis pendentia there must be litis contentatis, and so if the suit be ended by a decree or otherwise, there is no lis pendens to affect the land. The matter then becomes res judicata.—Pal's Transfer of Property Act, p. 83.

# Section 53.

Source.—Statutes 13 Eli. 2, C. 5, and 27 Eli. 2, C. 4 which have been repealed by this section, and were in force for nearly three centuries, have been abridged within such small compass. "Section 53 deals with transfers made to defraud prior and subsequent transferees or co-owners, or to delay the transferor's creditors; and replaces the Statutes of Elizabeth relating to fraudulant conveyances."—Whiteley Stokes Anglo Indian Code.

Intent to defraud.—Intent to defraud is in such particular case a question of fact, and if fraud is sufficiently proved, it is enough to vitiate all transfers at the option of the person defrauded. The difficulty of proving fraud induced the Legislature to add the second paragraph of this section which is but the result of the decisions in cases coming under the Statutes of Elizabeth. If the transfer is gratuitous or for a grossly inadequate consideration, then a rebuttable presumption arises as regards the intent of fraud. But that presumption may be rebutted by showing, as has been laid down in paragraph three, that the transfer was made in good faith and for consideration. The test of good faith is doing things with due care and diligence for a lawful consideration, and without any bad intent.

### CHAPTER III.

### Section 54.

Scope.—The law as to the relative duties and rights and liabilities of vendors and purchasers, both prior and subsequent to the sale, as well as that part of the law relative to duties and rights and liabilities of lessors and lessees, seems to be the partial codification of the legal doctrines as have been treated by Mr. J. Henry Dart in his celebrated treatise on Vendors and Purchasers of Real Estate.

Sale and Registration.—This section virtually abolishes optional registration with regard to sale of property for a value less than one hundred rupees. Under the registration Act, sale of property for a value less than one hundred rupees, by an unregistered instrument without delivery of possession is valid. But by this section such sale if unaccompanied by delivery of possession, is invalid, and consequently passes or transfers no interest in the property sold from the vendor to the purchaser. Therefore, by s. 3 of Act III. of 1885, paragraphs two and three, this section has been declared as supplemental to the Indian Registration Act. This provision has suppressed fraud and litigation to a great extent.

Delivery of Property of a value less than one hundred rupees.—Where the value of the property is less than Rs. 100 it can be transferred in one of the two ways, namely, (1) by registered instrument or (2) by delivery of possession. So where there is no delivery, because the vendee has been in possession of the property from before the date of sale, and there is no registered instrument, the sale is invalid,—Gunga v. Kali, 22 c. 179.

Sale and payment of Consideration.—Sale is transfer of ownership. If the seller has no ownership or right to the property sold, he cannot pass a good title to the property, and hence such an instrument is inoperative as a sale-deed. It can however operate as a contract for sale. If the property subsequently comes into the

Trans. Pro. Act.-3.

hands of the seller, the purchaser obtains a good title by virtue of his sale-deed.

Sale is a transfer of ownership in exchange for a price. If the sale-deed be regularly executed and registered but if there be no exchange of price or consideration, then the sale is not complete, and the purchaser obtains no good title, to the property against a subsequent purchaser for consideration by virtue of his sale-deed. Hence if the same property be subsequently sold by another instrument for a consideration, the subsequent sale passes a good title to the property to such subsequent purchaser as against the prior purchaser. But, as against the vendor, the sale is complete as soon as the deed is registered.

Part payment of consideration.—A deed of sale of immoveable property having been duly executed and registered and delivered, and the purchaser having paid a portion of the purchasemoney to the vendors, held, with reference to this section, that these facts am unted to a full property sold, notwithstanding that he had not paid the balance of the purchase-money to the vendor or to a mortgagee of the property as stipulated in the deed.—Shib v. Bhagwan, II All. 244.

Contract for sale.—A contract for sale is not a conveyance and does not, or itself, create any interest in or charge on the property. But it confers a right upon the contractee to compel the contractor, as well as any subsequent purchaser of the same property with notice of the contract to specifically perform the contract for sale. It creates merely a personal right. A contract for sale need not be registered.

Tangible immoveable property.—It is distinguished from abstract rights of property or incorporeal hereditaments, such as reversion easements, corrodies, franchises, annuities, rents, profits, etc. The latter cannot be conveyed by delivery of possession but only by a registered instrument.

Sale of Property by the Vendor out of Possession.— Under s. 54, a sale by a registered kobala is valid, although the owner may not be in possession at the time of the sale. A transfer of ownership of immoveable property is not a sale of an actionable claim, although the owner, at the time of the sale, may not be in possession.—Modun v. Futtarunnissa, 3 C. 297.

# Section 55.

(r) (a) Seller is aware.—The principle of English law is that the seller is bound to disclose defects of which he has the means of knowledge. But, under this clause, the liability of the seller is less stringent, for the seller may intentionally unit to look at his deeds in order not to become aware of any defects.

Defect in the Property.—This expression also includes defect in the title of the property sold; see I. L. R., 9 Mad. 89.—Gajapati v. Alagia.

Ordinary Case.—The seller is not bound to disclose patent defects, but he should disclose latent defects which are material, and of which he is aware, and the purchaser is not aware.

Material Defects.—Flaws of a trifling nature do not materially decrease the value of the property, and hence excluded.

Buyer is not aware.—If the buyer offers to purchase a piece of land for the purpose of mining, the existence of which is unknown to the seller, the buyer cannot rescind the contract of sale entered into by him on the ground that the piece of land does not really contain any mine, and that he was mistaken as to its nature.

In the Absence of a Contract to the contrary.—The contract must be specific and not general, and must describe the defects, the liability to which the seller wishes to avoid. In the English law, a general covenant to the effect that the buyer should take the property sold with all faults and subject to all rights, easements, incumbrances, leases, &c., will not diminish the liability of the seller to disclose defects, which are contemplated under this clause.

It is now settled law that the expression "defect in the property" includes not only defects in the estate itself, but also defects in the title to such estate.

- (t) (b) The title-deeds should be produced in order to show that the seller has a marketable title. If the buyer omit to ask for the title-deeds, then he may be bound by constructive notice. See notes under s. 3.
  - (1) (c) The questions must be specific and not general.
- (1) (d) When the buyer tenders it to him.—This expression shows that the expenses of preparation of the conveyance should be borne by the buyer. But the costs of completing the title of the vendor, or rendering the title of the vendor marketable, must be borne by the seller. As to tender, see 4 Bom. H. C. 125.—Essaji Adamji v. Bhimji.
- (1) (e) The property and the title-deeds, become vested in the purchaser after the contract of sale, and the responsibility of the seller with regard to them is similar to that of a bailee under s, 151 of the Indian Contract Act. The vendor may be said to be trustee for the purchaser. But, if the property be destroyed in the interim; the seller shall have to bear the loss. See clause (2), sub-section (6).
- (1) (7) If, before the discovery of possession, the seller becomes dispossessed, then the buyer is not bound to pay the price, but he may

repudiate the contract. Cf. (4) (b) of this section. The ownership of the property passes from the vendor to the purchaser when the sale-deed is duly executed and delivered. The seller has then only a charge upon the property for the amount of the purchase-money. If, before the payment of the purchase-money a third person buys the right, title, and interest of the purchaser, the seller has only a right to recover the price from him (i.e., the new purchaser), but he cannot rescind the contract of sale. See I. L. R., 2 Bom. 547 (Umednal v. Dava bin Dhondibal), and 3 All. 77.—Ikbal Begam v. Gobind Prasad.

(1) (g) If the buyer pays off any dues of the seller to save the property, then he is entitled to recover them under the clause, and also on the equitable doctrine of contribution.

Except where the property is sold subject to Incumbrances. This proviso renders it incumbent upon the seller to pay off all incumbrances if the sale-deed does not contain any express covenant that the property is sold subject to incumbrances. See I. L. R., 6 All. 67.—Dost Muhammed v. Shulad.

- (2) A sale conveys with it a warranty of title on the part of the seller, and if the warranty is broken, the buyer is entitled to compensation from the seller for loss caused by the breach of warranty. See s. 117 of the Indian Contract Act and s. 25 (b) of the Specific Relief Act. Express condition and special contract in the sale-deed excluding the warranty of title, and express admission and acceptance of title by the buyer, will protect the vendor. If the purchaser, being aware of the defective nature of the title conveyed to him, takes possession of the property sold, then he cannot insist on the implied covenant for title when the defect is of a curable nature; but, when the defect is incurable, the vendor is not precluded from repudiating the contract of sale even after taking possession in pursuance of the sale-deed.
- (3) Document of title.—Collection-papers and account-books, although, strictly speaking, they are not documents of title, may yet be claimed by the purchaser for the beneficial enjoyment of the property purchased.
- (4) (a) Cf. s. 47 of the Indian Registration Act (III. of 1877) which runs thus:—
- "A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration."

When a conveyance is duly executed, registered, and delivered, then the ownership of the property passes to the buyer, and the conveyance operates from the day when it is executed. After the passing of ownership to the buyer, if the seller still retains the

property in his possession, then he is bound to account for the rents and profits received by him from the date of the execution of the conveyance to the buyer.

Before the sale is completed, the vendor can retain the property for unpaid purchase-money, but, after the completion of sale, he has only a charge upon the property sold for the amount of the unpaid purchase-money and interest thereon, and he can follow the property in the hands of any person not being a bond fide purchaser for value and without notice. See notes under ss. 40, 78, and 100.

- (5) (a).—Nature or extent of the sellers' interest e. g., the actual or imminent death of a prior life-tenant (Turner v. Harvy, Jac. 169), or of an insured life in case of a sale of a policy of life-insurance. But the buyer is not bound to disclose latent advantages unknown to the vendor, such as the existence of a mine, which increases the value of the property itself.—Darr's "Vendors and Purchasers," p. 119.
  - See I. L. R., 5 Bom. 450.—Sadashiv v. Dhakubai.
- (5) (b).—Under this section, by clause (r) (g), the seller is bound to discharge all incumbrances except where the property is sold subject to them. If the seller fails to discharge any incumbrance, or omits to mention about it to the buyer, and if the buyer does not undertake to dicharge it by the covenant in the sale-deed, then the purchaser discovering any incumbrance prior to the payment of the purchase-money, may retain out of it sufficient amount to discharge the incumbrances. It may happen that the seller, instead of receiving the purchase-money himself, may transfer it to a third person. In this case also the buyer will have the same equity against the transferee of the purchase-money as he has against the seller,
- (5) (e).— Cf. clause (1) (e) of this section. After the contract of sale and before the passing of owership to the buyer, if the property be destroyed by fire or by any other cause not arising out of any fault or negligence on the part of the seller, then the buyer is bound to bear the loss. See s. 86 of the Contract Act, and s. 13 of the Specific Relief Act. Under this clause it is provided that, as soon as the ownership has passed to buyer, the responsibility of the seller to take care of the property has also ceased, and if the property be then destroyed by any cause, except by the seller, then the buyer is bound to bear the loss.
- (5) (d).—In I. L. R., to Cal. 92, Garth, C. J., has remarked that "the fransferee would, as a matter of course, have taken the property subject to the charge. The only burden which he would not have taken upon himself would be the personal liability (if any) of the transferor, and it is possible that s. 55 may effect some literation in the law in that respect." See also I. L. R., 2 Cal.

141. The buyer is bound to indemnify the seller against the liabilities respecting the property which the latter had personally undertaken to perform, and for which the property stands as a security.

This clause is not applicable to sales in execution of decrees.— See s. 2 clause (d).

# (6) (a).—Cf. clause (e), sub-section (1).

After the contract of sale, and before the ownership has passed to the buyer, the seller is entitled to accession, accretions, profits and improvements. If, in the interim, the property be distroyed or deteriorated, then the seller is bound to bear the loss; and, in case the seller be found not to have taken as much care of the propety as an owner of ordinary prudence would take of such property, he is bound to make good the loss to the buyer. See clause (e) sub-section (1).

(6) (b).—All persons claiming under him with notice of the payment. Bona fide transferees for value and without notice are protected. This line of the buyer upon the property can be enforced against any mortgagee, purchaser, lessee, or any transfere, whose right has been created by the seller subsequent to the completion of the former sale, but before delivery of possession, and who had no notice of the payment of purchase-money.

### Section 56.

Note.—The doctrine of law enunciated in this section goes by the name of marshalling of sale and is intimately connected with the doctrine of marshalling of securitries (s. 81 ingra). "If two estates, X. and Y., are subject to a common charge, and estate X, is sold to A, A will as against the vendor and his representatives, have a prima facia equity in the absence of express agreement and whether or not he had notice of the charge to throw it primarily on estate Y in exoneration of estate X." Dart's Vendors and Purchaser, p. 1035. This section empowers the buyer as against the seller to have the charge satisfied out of the other property. It appears that the buyer of one of the properties is entitled to exercise his right under this section as against a subsequent innocent purchaser of the remaining property which would therefore have to bear the entire burden of the charge. Notice of the charge does not interfere with the application of this section, and in this respect it is different from the doctrine of marshalling as is laid down in s. 81,

Charge.—The word charge has not been used in this section in the limited sense as is defined in s. 100, but includes a mortagage as well.

#### Section 57.

Note.—This section has been enacted for the realisation of proper value of encumbered estate. It provides for the substitution or conversion of securities into another shape, and facilitates the alienation of incumbered estates. As a general rule Courts should order for the service of notice upon the incumbrancer in order to afford him an opportunity of showing what is due to him, and what is the proper substitution for his encumbrances.

### CHAPTER IV.

Scope.-This section deals with immoveable property.

#### Section 58.

Ancient law of Mortgage.-The oldest form of the contract of pledge was that of mancipatio or absolute sale of the thing subject to a contract of fiducia or agreement for redemption. There were so many things to which mancipatio was considered inapplicable, that the more simple contract of pignus quite superceded this mancipatio contracta fiducia. By pignus the lender only obtained possession but ownership is left with the borrower. A further simplification of the contract of pledge was the hypotheca, in which the thing pledged remained with the pledge. So the mancipatio transferred both the property and possession of the thing pledged; the pignus gave the possession to the creditor, but left the property in the thing with the debtor. The hypotheca left both the property and the possession with the debtor. The creditor had the right (1) of selling or pledging the thing pledged: (2) of satisfying his own claim before that of any one else out of the proceeds of the sale or of the money obtained by pledging the thing; (3) of having himself constituted ower of the thing if no purchaser could be found for it.—Sandar's Fustinian.

Derivation of Mortgage.—This word has the French origin; mort means dead, and gage or vadium means pledge. The security or pledge becomes dead or lost to the debtor, or forfeited in default of payment.

At law a mortgage was strictly an estate upon condition, the estate being forfeited upon the condition being broken, or in other words, "an absolute conveyance subject to an agreement for a reconveyance on a certain given event."

In Equity, "a mortgage-debt is a sum of money the payment whereof is secured, with interest, on certain lands, and being money, is personal property, subject to all the incidents which appertain to such property;" in fact a mortgage was regarded merely as a security or pledge.

Three old forms of mortgage were.—(1) vivum vadium, an absolute conveyance of land by a debtor to his creditor, to be held by him until he was repaid principal and interest out of the rents and profits; (2) mortuam vadium, a feoffment of land by a debtor to his creditor, to be held by him until payment of a given sum, he meanwhile receiving rents and profits without account; (3) Welsh mortague, a conveyance similar to the last, the estate being redeemable at any time, and the creditor receiving the rents and profits in lieu of interest.

Difference between lien, pledge and mortgage.—A lien, as a general rule, gives a mere passive right of retainer or possession without any active right and is thus distinguishable from mortgage or pledge. A pledge only passes the possession, or at most a special property to the pledge with a right or retainer till the debt is paid or the engagement is fulfilled. As regards mortgage it must be remembered that there are two kinds of mortgage namely. (1) mortgage of personal property and (2) mortgage of real property. A mortgage of personal property has been defined "a transfer of the ownership itself, subject to be defeated by the performance of the condition within a certain time." In this Act mortgage of realty alone has been treated.

Clause (a).—A mortgage in order to be operative must be of a specific immoveable property. So where a bond containing "whatever property etc., belonging to me be found would be available to my creditor," created a charge upon the immoveable property of the obligor, but not a mortgage of immoveable property (9 A. 158). So also a mortgage of non-existent property is inoperative as a conveyance, yet in such a case it is operative as an executory agreement which attaches to the property the moment it is acquired, and in equity transfers the beneficial interest to the mortgage. Without any new act done by the mortgagor to confine the mortgage.—Khobhari v. Ram. 7 C. L. J. 387.

Clause (b) Simple mortgage.—This definition is vague and defective. It has not set out in clear and unequivocal terms all the essential clements of a "simple mortgage" as distinguished from a mere "charge," which has been defined in section 100 of this Act. The difficulty of gathering the real intention of the Legislature as to what they meant by "simple mortgage" has been so great that it has induced the several High Courts to refer the matter for the opinion of a Bull Bench, and in consequence, several conflicting decisions on the subject have resulted.

According to Mr. Justice Mahmood simple mortgage is a species of what are known as jura in re aliena, that is, estates carved out of full ownership, and that, when such estate has once been created, the mortgagor cannot represent it in any subsequent litigation, (8 A. 324.)

Distinction between a mortgage and a charge.-A mortgage is a transfer of an interest in specific immoveable property. A charge only secures payment of money out of that property. Either may be created by act of parties; but when "the transaction does not amount to a mortgage," and does not therefore operate as a transfer, it is a charge on immoveable property. A document which only gives a right to payment out of particular property without transferring it has been held to create a charge. The distinction between a simple mortgage and a charge is very important. In simple mortgage an interest in immoveable property is transferred, but in the case of "charge" no interest is transferred. In "mortgage" the property mortgaged must be a specific, but a "charge" may be created upon the wealth and property of a person. A riea of purchase for value without notice may be a good defence against a charge, but will be wholly unavailling against a mortgage. In cases of lis pendens and priority also this distinction is of vital importance.

Clause (c) Mortgage by conditional sale.—In this class of mortgage there is no personal liability on the part of the mortgagor to repay the debt. The transaction known to Mahomedan Law as a bai-bil wafa is a mortgage within the meaning of s. 58, and not a sale. But a mortgage by conditional sale must be distinguished from a sale with a clause for re-purchase "prima facie an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and became a mortgage merely because the vendor stipulates that he shall have a right to re-purchase,"-Bhaban v. Bhagban, 12 A. 387 P. C. In such a case the intention of the parties is to be gathered in order to determine whether a transaction is a mortgage by a conditional sale or a sale with a clause for re-purchase. Where however mention is made about payment of interest or principal then the transaction obviously is a mortgage by conditional sale.

Clause (d) Usufructuary mortgage.—In usufructuary mortgage the mortgage is given possession of the property and the mortgage is not personally liable to the mortgage in the absence of a distinct agreement to that effect. Zuripeshgee lease is a sort of usufructuary mortgage. It sometimes becomes a matter of difficulty to distinguish a lease from an usufructuary mortgage.

Clause (e) English Mortgage—In an English mortgage (a) there is covenant to repay or personal liability to pay; (b) there is an absolute conveyance of the property subject to the condition of reconveyance on payment of the mortgage-money after a certain date. But, in a mortgage by conditional sale (a) there is no personal libility to pay, (b) the sale is ostensible to be perfected into absolute sale on failure of the pay ment of the mortgage-money on a certain date. In the former, the mortgagee has a right to enter upon immediate possession of the property, while, in the latter, there is necessarily no such

right. In the former, the absolute sale may be converted into a mortgage, while, in the latter, the ostensible sale or mortgage is liable to be converted into an absolute sale.—See 2 B. 113, 231; 9 C. 234.

#### Section 59.

Registration.—Registered documents have priority over unregistered valid documents.

Equitable mortgage.—An equitable mortgage may be created by a formal mortgage of the equity of redemption or by a written agreement whereby the property is charged or agreed to be made a security for the advance, or by a mere deposit of deed without any writing. In India equitable mortgage not only creates a right in personam but a right in rem. Equitable mortgages create interest in land; so a document, as such requires registration, whereas the same document looked upon as an agreement to mortgage does not require registration.

Attestation.—"Attest" means only to witness the execution of a deed. "To attest" is to bear witness to a fact. The mortgage deed was properly executed when the signatures of the witnesses were affixed for them to the deed by another person, with their consent they being illiterate (33 C. 861).

Signing.—So far as the meaning of the word "signed" in s. 59 of the Transfer of Property Act is concerned, a signature need not be by the mortgagor personally, but may be by some person acting in his behalf or under his authority.

# Section 60.

Notes.—Ss. 60, 61, 62, 63, and 64 deal with the rights of a mortgage, and ss. 65 and 66 treat of the liabilities of a mortgagor.

Any time.—Except in cases of usufructuary mortgage where time is generally fixed in accordance with the agricultural condition of the country, a mortgagor can redeem the mortgage at any time after the principal money has become payable. The Legislature has not fixed any arbitrary time at which the principal money becomes payable. When does it become payable then? It must be gathered from the covenant of each individual mortgage-deed. The Legislature should have added "or recoverable" after the word "payable" and that would have placed all difficulties of interpretation at rest.

It is contended that "at any time after the principal money, has become payable" includes also "any time after which the principal money has become recoverable." For the test is mutuality; if the mortgagee cannot recover before any stipulated period, the mortgagor also should not be entitled to liquidate before that stipulated period. So it was held by the Bombay High Court In

Vadju v. Vadju, 5 B. 22) that the general principle as to redemption and foreclosure is that, in the absence of any stipulation, express or implied, to the contrary, the right to redeem and the right to foreclose are co-extensive, and that, where there is a stipulation to pay a mortgage-debt in ten years, the mortgagor could not redeem at an earlier date. In Brown v. Cole, (14 Sm. 427) it was laid down that a person could not redeem before the time appointed in the mortgage-deed, although he tenders to the mortgagee both the principal and interest due up to that time. But Mr. Justice Mahomed in Bhagwat Das v. Parshad Singh, (10 A. 602) remarked that: "I am of opinion that no such general rule of law exists in India as would preclude a mortgagor from redeeming a mortgage before the expiry of the term for which the mortgage was intended to be made, unless indeed the mortgagee succeeds in showing that, by reason of the terms of the mortgage itself, the mortgagor is precluded from paying off the debt due by him to the mortgagee." In a Madras case also it was held that where the mere fixation of the term occurs in a mortgage-deed, the presumption is that that the date is fixed for the convenience of the debtor, and that he may repay the debt at an earlier period, unless the mortgagee could show that any such stipulations existed between him and the mortgagor as would debar the latter from redeeming the mortgage before the expiry of the term mentioned in the mortgage (2 M. 314). But in a later Madras case (Tirugnana v. Nallatambi, 16 M. 486) it was held that, "having regard to s. 60 and s. 62 of the Transfer of Property Act, the Legislatures appear to have adopted the principle that, in the absence of a stipulation to the contrary, the presumption is that the right to redeem and the right to foreclose arise at the same time, and that, when a date is fixed for payment of the mortgage-debt, and the mortgagee cannot foreclose earlier, the mortgagor also cannot redeem before the appointed time."-See also Purna v. Peary, 17 C. W. N. 140.

Exception.—The exception mentioned in the last paragraph of this section is very important. The general rule is that the right to redeem is indivisible. But when a mortgagee acquires, in whole or in part, the share of a mortgagor, then the indivisible character of the right of redemption is destroyed. But there is a limit of such divisibility. The acquisition of a mortgagor's share must be by all the mortgagees jointly when there are more mortgagees than one. But, when one of several mortgagees acquires the right to redeem the share of one of the mortgagors; it does not entitle another of the mortgagors to redeem his own share only, but he is required to discharge the whole mortgage debt.—Mahatab v. Sant, 5 A, 276.

Mortgagor has a right.—Here "mortgagor" includes his heirs and assignees, as well as all persons enumerated in s. 91.

Payment or tender of the mortgage-money.—The expression "mortgage-money" means the whole of the mortgage-money. If any portion of the mortgage-money remains unpaid, the mortgager cannot redeem.

Mortgage-deed.—The mortgagee has a lien on the mortgage-deed for the unpaid amount of the mortgage-money.

Reasonable notice.—Any provisions or stipulation for notice in the mortgage-deed is valid in a case (1) where the mortgagor allows the fixed term to pass away without payment or tender (2) where no time is fixed. In the absence of any contract to the contrary the mortgagor is entitled to make the payment or tender at a proper time and place, and thereby discharge the obligation and extinguish the security. But no such notice is necessary in the case of a suit for redemption. In England six months' notice is necessary, but here only reasonable notice is required regard being had to the opportunity of the mortgage to find a new investment for his money. If the loan be of a temporary character, such as by the deposit of title-deeds, no such notice is necessary.

#### Section 61.

Note.—The principles of "tacking" and "consolidation" are technical principles of English law, which had their origin in Courts of Equity, both of which have been enacted inapplicable to our Courts by this Act.

These principles seem to have arisen upon the ground that right of redemption is an equitable right, and the seeker of equity must perform equity himself, so that the mortgagor may not redeem one mortgage without on his part doing equity to the mortgagee by liquidating all the debts at once, for otherwise the unredeemed security may be insufficient for the unliquidated debts. But it may be argued that mortgages are but contracts, and the rights and liabilities of the contractor and the contractee should be judged and discharged by the covenant and peformance of each individual contract without reference to any extraneous rights and liabilities of the parties arising out of any subsequent or separate contract.

# Section 62.

Mortgagor has a right.—The mortgagor has a right in addition to the rights mentioned in s. 60.

Clause (b),—Clause (b) contemplates cases of usufructuary mortgages, usufructuary qua interest, but does not cover all possible cases. In cases where rents and profits are to be applied for the liquidation of the interest and in partial reduction of the principal money after adjustment of accounts, then the mortgager may sue for the redemption of the usufructuary mortgage, that is, can claim possession of the property on payment of the balance due after an adjustment of account.

### Section 63.

Note.-S. 70 is co-relative to this section.

Accession.—This section provides for two kinds of accessions, vis., (1) natural accession, and (2) acquired accession. All natural accessions enure to the ben efit of the mortgagor irrespective of any provision of this section. The provision of this section is subject to contract between the parties. In the absence of any contract to the contrary, the mortgagor is entitled to all acquired accessions subject to the provision of this section.

Second paragraph.—The second paragraph of this section divides itself into two parts, vis., (1) where the accession is capable of separate enjoyment without detriment to the principal property, and (2) where the accession is not capable of separate possession, or separate enjoyment is impossible. The second part may be again subdivided into two parts, namely (a) where the acquisition of the accession was necessary to preserve the principal property from destruction, forfeiture, or sale, or made with the mortgagor's assent; (b) when the acquisition was voluntarily acquired by the mortgagee. By this provision the mortgagee cannot claim any expenses of his voluntary acquisitions, which must pass to the mortgagor upon redemption. The above-mention ed sub-division (a) should have contained, in the case of usufructuary mortgage, "when the acquisition of the accession was necessary for the proper, if not full, enjoyment of the principal property, the mortgagor is liable to pay the expenses of the acquisition." Cf., s. 72 clause (b).

# Section 64.

Note.—In such a case the mortgagor must pay to the mortgagee the expense incurred by the latter in getting the renewal.

# Section 65.

Clause (a).—This clause refers to an implied warranty of title by a mortgagor. In cases of breach of implied warranty of title, and defective or imperfect title, the mortgagor may be sued for the principal money and interest in the shape of compensation for the breach of implied contract as regards warranty of title even before the stipulated period mentioned in the mortgage-deed, for the cause of action arises on the breach of the warranty, and not at the expiration of the stipulated period. It does not matter whether the mortgage be a usufructuary mortgage or a mortgage by conditional sale.

Clause (b).—If a third party sues the mortgagee in possession for the recovery of the mortgaged property, setting up a title in himself, the mortgagor is bound under clause (b) to defend his title and if he or the mortgagee, as the case may be, defeated in the suit, the mortgagee, by showing that decision, can make the mortgagor personally liable for breach of warranty of title.

Clause (c).-Public charges include revenues and cesses, etc.

Clause (d).—In clause (d) of this section the words are "where the mortgaged property is a lease for a term of years." The Legislature should have added "or for indefinite period in a permanently settled district."

Clause (e).—This clause contemplates case where the same property is mortgaged to two or more mortgagees one after another.

### Section 66.

Note.—If the security becomes insufficient, the mortgagee may sue for the money without waiting for the expiration of the stipulated period.

#### Section 67.

Note.—Sections 67, 68, 69, 70, 71, 72, 73, 74 and 75 deal with the right of a mortgagee, and sections 76 and 77 treat of the liabilities of a mortgagee.

Prohibitions.—(1) A simple mortgagee, as such, cannot foreclose: (2) A usufructuary mortgagee as such, cannot foreclose and sell: (3) A mortgagee by conditional sale cannot sell: (4) A mortgagee's trustee or a mortgagee's legal representatives happening to be the mortgagor and possessing the power of sale, cannot foreclose: (5) A mortgagee of works of public utility cannot foreclose or sell.

### Section 68.

Olause (a).—According to English Law where there is in a mortgage nothing to the contrary, the mortgage contains within itself, so to speak, a personal liability to repay the amount advanced. (Sulton v. Sulton, 22 Ch. D. 557). But the above-mentioned rule of law seems to have been departed from by this clause. So the meaning of the section is that "where the mortgager binds himself by the covenant in the deed to repay the same, then only has the mortgagee a right to sue for 'the mortgage-money." In cases of simple mortgage, and English mortgage a personal liability is created but not so in cases of usufructuary mortgage or mortgage by conditional sale.

Olause (b).—Where the mortgagee cannot follow the security owing to the wrongful act or default of the mortgagor, the mortgagee can sue the mortgagor for the mortgage-money. This clause does not provide for the wrongful act or default of any other person, neither does it make any provision for distinction caused by vis major or as mani Sultani, such as accident of fire, flood or the like. The last paragraph of this section has provided for these cases.

Clause (e).—Under this clause an usufructuary mortgagee can sue for mortgage-money, when possession is not delivered to

him or when after delivery of possession he is disturbed in his possession by the mortgagor or any other person. So he is entitled to sue if his possession is disturbed from any cause, during the time for which he is entitled to remain in possession (6 C. L. J. 143).

Last paragraph.—If the mortga gee is deprived of the security by any other cause, that is by vis major or by the wrongful act of any other person, the mortgagee may require the mortgager to furnish another sufficient security, and, the mortgager failing to do it, may sue for the mortgage-money.

#### Section 69.

Note.—This section enumerates the instances in which the mortgaged property can be sold without the intervention either of the mortgagor or of the Court.

#### Section 70.

Note.—Illustration (a) refers to a natural accession and illustration (b) refers to an acquire d accession. The right of the mortgaged under this section is subject to any contract between the parties. As the accession becomes a part and parcel of the original security, it is subject to the mights and liabilities of the same.

Principles.—Under the English law which, in so far as it rests on principles of equity and, good conscience, may properly be applied in India, it is recognized as a general rule that most acquisitions by a mortgagor enure for the benefit of the mortgagee; and conversely, that many acquisitions by a mortgage are in like manner, to be treated as accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption.

# Section 71.

Note.—The law laid down in Rakestraw v. Brewer (2 P. W. 511), as to the renewal of a term obtained by the mortgagee of the expired term being "as coming from the same root," subject to the same equity, has never been impeached.

# Section 72.

Clause (a),—Usually to P. C. is allowed for cost of collection.

Clause (b).—S. 72 clause (b) does not permit a mortgagee in possession to effect improvement. Therefore, in a suit for redemption, the costs of such improvements cannot be legally charged against the mortgagor seeking to redeem. The clause (b), read with the penultimate paragraph of this section, clearly indicates that such money alone can be added to the mortgage-money as become necessary for the preservation of the property from destruction, forfeiture or sale. Money spent on reasonable improvements.

although recoverable from the mortgagor or his representatives on equitable grounds, cannot be added to the principal money.—See Arunachella v. Sithayi, 19 M. 327.

Clause (c).—If a stranger attacks the mortgagor's title, the mortgagee may spend reasonable amount to support the mortgagor's title, and may tack the amount to the mortgage-money.

Clause (d).—The mortgages is entitled to tack the expenses of any litigation arising between the mortgages and the mortgagor regarding the validity of the mortgage. But, if a third party attacks the mortgages's title, the mortgages is not entitled to the cost of defending his title against the mortgagor.

Clause (e).—If the lease be not renewed, the mortgaged property becomes extinct. Hence renewal enures to the benefit of the mortgagor, mortgagee, and all other persons interested in the mortgaged property.

Clause (f).—The mortgagee can tack or add the insurancepremiums paid by him to the mortgage-money in the absence of any contract to the contrary.

Section 73.

Note.—Revenue or rent is always the first charge upon all mortgaged properties. Although revenue or rent may accrue due after the date of the mortgage, the mortgaged property may nevertheless be sold by the Government or the Landlord for the satisfaction of the arrears, plus all costs incidental to the sale. In case of revenue-sale the mortgage is not protected, but the mortgage has a charge on the surplus sale-proceeds. In case the mortgaged property be sold for arrears of rent free from all incumbrances, the mortgage becomes tipso facto extinguished and the mortgagee has no remedy other than a charge upon the surplus sale-proceeds, after deducting the arrears of rent sued for, the incidental costs of sale, and the amount accruing due from the date of the suit till the confirmation of sale.

After payment of the said arrears.—Here arrears should include all incidental expenses in bringing the property to sale for the arrears of revenue or rent.

# Section 74.

Tender.—Tender is of two kinds.—(1) by delivery which acts as an absolute discharge; and (2) of payment which is not a discharge of the debt, but a willingness and readiness to pay the money on demand.

It should be observed that the subsequent mortgagee can discharge only the mortgagee immediately preceding him, and by paying up any other prior mortgage, he does not step into the place of that mortgagee, to the prejudice of any other intermediate mortgagee, who alone is benefited by such payment. It is to be also noted that by paying up the next prior mortgagee the subsequent mortgagee acquires all the rights and powers of the former. The mortgage is not thereby extinguished but remains subsisting, and becomes vested in the subsequent mortgagee.

Section 75.

Note.—This section defines what may be the rights of a subsequent mortgagee paying up the prior mortgage, against a prior mortgagee, as also against a subsequent mortgagee. But this section does not define what may the rights of the subsequent mortgagee as against the mortgagor.

### Section 76.

Clause (a).-Vide s. 151 of the contract Act.

Ordinary prudence.—It means such prudence as the average of careful men take in their own affairs. A mortgagee is not responsible for want of skill, but he is responsible for want of due diligence.

Clause (b).—If the mortgagee brings a suit but still fails to collect rents and profits he is not responsible for the loss resulting from it.

Clause (c).—Revenue or rent being the paramount charge upon all properties must be paid by the person in possession. But the mortgagee is entitled to credit in the accounts any sums spent by him in preventing the forfeiture or sale of the mortgaged property.

Clause (d).—If there is any express contract, the parties are bound by it, and the Court cannot grant any relief in contravention of it.

Clause (e).—Mere wear and tear for reasonable use is not waste, and a mortgagee in possession is not liable for it.

Clause (f).—The mortgagee can insure the mortgaged property, in the absence of any contract to the contrary. In the absence of any direction from the mortgagor to apply the insurance-money in reduction or discharge of the mortgage-money, the mortgagee must apply such money in reinstating the property.

Clause (g).—But a mortgagee may relieve himself from the liability of accounting for actual receipts by an agreement with the mortgagor (vide s. 77 infra).

Olause (h).—The principal money and interest of which payment is secured for the time being are called mortgage-money.

Clause (i).—In cases of legal or eqitable mortgage a tender properly made and improperly rejected is not equivalent to payments.

Trans. Pro. Act.-4.

and neither extinguishes the mortgage-debt nor determines the mortgagee's property in security. A proper tender will stop the running of interest, if the mortgagor keeps the money ready to pay over to the mortgagee, and does not afterwards make any profit out of it.—Satayabadi v. Hirabati, 5 C. L. J. 192.

#### Section 77.

Note.—When there is a contract that the mortgagee in possession will appropriate the rents and profits accruing from the property in lieu of interest, or partly in lieu of interest and partly in payment of a fixed amount of the principal, the morgagee may neglect to collect the rents and profits, and he will not be responsible to any body for the barred debts due from the tenants. He need not make the necessary repairs out of the profits realized by him. He need not keep any account of the profits derived by him, neither is he bound to account for the same to any body.—See 10 Moo. I. A. 340; 2 Mad. H. C. 289.

#### Section 78.

Fraud.—Fraud is divided into two kinds, (a) actual fraud and (b) constructive fraud.

- (a) Actual fraud.—An actual fraud has been defined as something said, done or omitted, with the design of perpetrating what the party must have known to be a positive fraud.
- (b) Constructive fraud.—Constructive frauds are acts, statements, or omissions, which operate as virtual frauds on individuals, or, if generally permitted, would be prejudicial to the public welfare, and are not clearly resolvable into mere accident or mistake, and yet may have been unconnected with any selfish or evil design, or may amount, in the opinion of the person chargeable therewith, to nothing more than what is justifiable or allowable.

Misrepresentation .- For definition vide Contract Act. s. 18.

Priority.—This is a case in which the prior mortgagee may not get priority. Where an equitable mortgagee parts with the title-deeds and so enables the depositor to make another equitable mortgage, he may be postponed to such second equitable mortgagee by reason of his laches in not getting back the deeds—on the principle that, as between two innocent parties, the one must suffer who has permitted the fraud to be committed.—Waldron v. Scopper, t Drew 103.

# Section 79.

Note.—This section enacts that in cases of future advances or uncertain amount, when the maximum to be secured is expressed, the prior mortgagee will have priority upto the maximum amount

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expressed to any subsequent mortgage if made with notice of the prior mortgagee, though the advances upto the maximum be made with notice of the subsequent mortgage. But on the other hand, if the subsequent mortgage is made without notice of the prior mortgage. the prior mortgage will be postponed to the subsequent mortgage in respect of the advances made after the subsequent mortgage. But this law is different from the English rule. Under this section the right of priority of the first mortgagee depends upon whether the subsequent mortgagee had or had not notice of the prior mortgage. But in England the right of priority of the first mortgagee depends upon whether the first mortgagee hid or had not notice of the second mortgage when the subsequent advances were made. Under this section, it seems that, when a maximum is expressed in the covenant, the first mortgagee is bound to make further advances upto the maximum until he gets a notice of a subsequent mortgage. If the subsequent mortgagee advances money without any notice of the first mortgage, the mortgagee will suffer, and his subsequent advance will be postponed to the second mortgage. - Pal's T. P. Act. D. 180.

#### Section 80.

Note.—The rules of English law is that third mortgagee, without notice of second, buying in first mortgage, with notice of second, may tack. The principle is this, that the rule of equity requires no more than the 3rd mortgagee should not have had notice of the 2nd at the time of lending the money; for it is by lending the money without notice that he becomes an honest creditor, and acquires the right to protect his debt. So also if the first legal mortgagee lends a further sum to the mortgagor upon a statute or judgment, he shall retain against a mesne mortgages until both his securities are satisfied; and a fortiori if the first mortgagee lends on a mortgage. This was English principle of law, where law and equity were administered by different tribunals before 1875. But as in this country, law and equity are administered by the same tribunal, the rule qui prior est tempore, potior est jure (what is prior in respect of time is superior in right) must prevail.

Consolidation distinguished from Tacking.— The doctrine of consolidation depends upon a principle altogether different from that upon which tacking depends. Because, in tacking, the right is to throw together several debts lent on the same estate, and to do so under the priority and protection afforded by the legal estate; but, in consolidation, the right is to throw together on one estate several debts lent on different estates, and to do so without reference to any priority or protection afforded by the legal estate, but solely upon the equitable maxim that he who seeks equity must do equity Further, not only is get ing in the legal estate not necessary as a preliminary to consolidation as it is to tacking, but even notice at the time of lending

the mortgage-money on the second estate, which would be fatal to any subsequent right of tacking, is wholy immaterial as regards the right of consolidation."—Fisher on Mortgage, p. 678.

#### Section 81.

Marshalling.—If a person, having two real estates, mortgages both estates to A, and afterwards mortgages one only of the estates to B, whether or not B had notice of A's mortgage, the Court directs A (but always without prejudice to A) to realise his debt out of the estate which is not in mortgage to B, so as to have the one estate which is in mortgage to B to satisfy B, so far as it goes.—Lanoy v. Duke of Athole, 2 Akk. 446. The principle of marshalling is based upon equity. If a creditor, having a right to proceed against two funds, proceed against the fund which was the only resource of some other creditor, less amply provided for than himself, then equity held in such a case that the creditor by resouring to the fund which was the only resource of another creditor should not disappoint that other.

#### Section 82.

Note.—The intention of s. 82 is not that the lien of the mortgages should be split, but simply to determine the liabilities of the purchasers inter se; and that, therefore, all the mortgaged properties are liable to the satisfaction of the plaintiff's claim.—Raghunath v. Harlal, 18 C. 320.

Object.—Like the doctrine of marshalling, the doctrine of contribution is also an equitable principle of law and is necess-ry to prevent hardship being done by any unconscionable creditor in collusion with one or some of the owners of several encumbered properties towards any other of the owners of such properties because the latter is entitled to a right of contribution against the favoured owners of encumbered proprities.

Principle.—If one of the estates have been mortgaged for one debt, and both of them for another though the first shall bear exclusively its own debt, both must contribute rateably to that which is later; the amount of the first debt being deducted from the rate of the estate which has paid it; but, if there are successive loans, and successive securities, and nothing to show that one estate was to be charged before another, all will be charged rateably, provided there be an actual specific charge upon each estate, and not merely a general charge or liability upon one or them; it being necessary in order to raise a case of rateable apportionment that each property shall be equally liable.—Fisher on Mortgage, pp. 659-660.

Proviso.—The proviso of this section makes s, 82 subject to the provision of s. 81, or in other words, in cases where the right of marshalling collides with the right of contribution, then the latter right is controlled by the former. The property, in respect to which the right

of marshalling may be successfully claimed, is not required to contribute rateably for the first mortgage-debt, because, in that case, the right of marshalling would be nugatory.

#### Section 83.

Note.—Cf. s. 60 and 91. S. 60 provides for payment or tender at a proper time and place; s. 83 provides for deposit in Court and service of notice of such deposit to the mortgagee; and s. 91 provides for a regular suit for redemption. S. 60 confers the right upon the mortgagor alone; ss. 83 and 91 confer the right of deposit or right of a suit for redemption upon the mortgagor, as well as upon all other persons enumerated in clauses (a), (b), (c), (d), (e), (f) and (g) of s. 61.

#### Section 84.

Notice.—Any notice before tender or payment after the expiry of the fixed time for payment is not necessary if the mortgagee has waived it by demanding payment, or if the mortgagor is willing to pay in advance any reasonable period which is ordinarily necessary for finding out a suitable new investment for the creditor's money. In England six months' notice is ordinarily given.

#### Section 91.

Notes.—The persons mentioned in the section are necessary parties in a mortgaged suit, if they are not joined their rights cannot be affected by a decree passed in their absence.

#### Section 95.

Note.—One of several mortgagors redeeming the mortgaged property can sue the other mortgagors for contribution, and for the enforcement of the charge created by this section.

—I A. 455. The words "obtains possession" are not used to include a simple mortgagor. The charge is created although possession may not be obtained by the mortgagor who redeems. But if the defaulting sharers sell their shares to any bona fide purchaser for value without notice before the enforcement of the charge mentioned in this section, the co-sharer who redeems cannot follow the shares.

### Section 98.

Anomalous mortgage.—S. 58 describes four forms of mortgage, namely, (1) simple mortgage, (2) mortgage by conditional sale, (3) usufructuary mortgage and (4) English mortgage. This section adds two others, namely, (5) a combination of simple mortgage and usufructuary mortgage and (6) a combination of mortgage by conditional sale and usufructuary mortgage. Besides these

6 kinds of mortgage all other mortgages go by the name of anomalous mortgage and are to be dealt with in accordance with the intention of the parties as evidenced in the title-deed.

#### Section 100.

Difference between mortgage and charge.—In a mortgage an interest in the mortgaged property, whereby the mortgage can bring the mortgaged property to sale, is transferred to the mortgagee. But in a charge no such interest or right is transferred. Where a charge is created by an act of the parties, e.g., a contract, the contract is personal, and does not run with the land. The property remains absolutely free from any incumbrances as regards a third person who is a stranger to the contract. The owner of the property may transfer the property or an interest in it to any other person. The owner of the property may transfer the property or an interest in it to any other person, and if the latter happen to be an innocent transferee for value without notice of the charge, the charge-holder will not be allowed to follow the property. But if an interest in the property be already transferred by mortgage, having no such interest remaining to transfer again, can transfer only the remaining interest which he has, and that is a right of redemption (Vide 13A. 20), Again if a charge is created by operation of law, and the charge does not amount to a mortgage, any subsequent mortgage or sale of the property to a bond fide purchaser or mortgagor for value without notice will be affected by the prior charge. A charge-holder can, of course, follow the property if it remains in the hands of the person creating charge.

# Section 101.

Note.—At law, merger is the necessary consequence of the union of two estates in the same person in the same right but, in equity, two estates without any intervening interest may meet in the same person in the same right without merger, and on the other hand, though the estates are separated by an intervening interest, merger may take effect. The principle by which the Ccurt is guided is the intention; and in the express intention, either in the instrument or by parol, the Ccurt looks to the benefit of the person in whom the two estates become vested.

The chief importance of the doctrine of merger is with reference to charges. Thus A, the owner of an estate subject to a first incumbrance in favour of B and a second incumbrance in favour of C, contracts to sell the estate to D. If D, having actual notice of the incumbrance to B only, take a conveyance from A and B, so as to extinguish the charge of the latter, this act (if, by reason of his having constructive notice of C's incumbrance or otherwise, the defence of purchase for value without notice is not available) lets in the incumbrance of C as the first charge. If, on the other hand, D, being apprehensive of

an outstanding incumbrance, take an assignment of B's security to a trustee for him in order that it may be kept on foot, then the charge does not merge in the fee-simple; but, should C take proceedings for raising his charge, the purchaser may protect himself by the shield of B's incumbrance as the first charge. Again if B buys up the interest of A subject to the charge of C, and if the charge of B be not kept a foot, the incumbrance of C will be let in, unless the defence of purchase for value without notice be applicable.

Absolutely entitled.—This expression does not necessarily mean "free from all incumbrances," but has reference to the acquisition of an estate in fee-simple, as opposed to any limited estate, by purchase, bequest, succession or settlement. A first mortgagee purchasing the equity of redemption becomes entitled to the property.

### Section 103.

District.—District, means the local limits to of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court.

Any notice —See s. 79 and other sections of this chapter where service of notice affects the priority, right, liability, or position of the parties.

Tender.—See s. 60, s. 74, s. 69 (1) and (2), and s. 84, and notes under those sections,

Note.—In order to bind a minor or a lunatic with notice, it should be served upon the legal curator; but, if the service of notice be for the benefit of the minor or of the lunatic, the Court may appoint a guardian ad litem for the purpose of serving or receiving service of notice. In the Civil Procedure Code, Chapter XXXI, no such distinction has been drawn. Any minor or lunatic deriving any benefit must also be prepared to suffer any loss in the absence of any fraud or gross neglect on the part of the guardian ad litem.

# CHAPTER V.

# Section 105.

Note.—Section 117 declares that none of the provisions of this chapter apply to leases for agricultural purposes. The Legislature should have added "horticultural purposes" as well. The chapter is of great practical importance in the case of leases of building lands. Prior to the commencement of this Act there was no statutory law in British India guiding the relation of landlord and tenant of building-lands. The rights and liabilities of lessors and lessees of building-lands were determined by the ordinary principles of landlords and

tenants, and by the case-laws. This Act has clearly defined those rights and liabilities and codified them in a suitable form.

#### Section 106.

Absence of contract.—In the absence of any evidence as to the commencement of a tenancy or its character, it is to be presumed that the tenancy was a monthly tenancy expiring with the last day of the Bengali month of each year.—Pandit Rakhal Chandra v. The Secretary of State, 8 C. L. J. 34.

Notice.—The object of giving tenants notice to quit is, that, as the tenant is to act upon the notice when he receives it, it should be such a notice as he may act upon safely, and therefore it must be one which is binding upon all parties concerned at the time it is given, and needs no recognition by any one of them subsequently. No particular form of the notice is necessary, but there must be a reasonable certainty in the description of the premises, and in the statement of the time when the tenant must quit.—Parsons on Contracts, Vol. I. p. 514.

#### Section 107.

Lease granted before this Act.—The lease which was granted long before the Transfer of Property Act came into operation was not required to be in writing. It might have been made without any writing, and the English law which requires a lease for a term exceeding three years to be in writing and under seal, does not apply to a transaction like this in this country.—Kaniganj Coal Association v. Judoo Nath, 19 C. 493.

Lease.—If the tenant proposes to take settlement, and the landlord accepts it and grant his prayer, then it is clear that the document creates a present demise, and it is required to be stamped and registered, though it may be called an amalnama only in name. But, if the intention be not to create a present demise, but only to permit the tenant to take possession of certain lands for which lease will afterwards be granted at a certain rent and on certain conditions, then the instrument may be admitted as evidence of an admission without being stamped or registered. By s. 17 of the Registration Act, an agreement for a lease is also required to be registered.

### Section 108.

Clause (a)—Material defect.—The defect should be of such a nature as to thwart the purpose for the lease was taken. If the lease be taken, to the knowledge of the lessor, for any specified purpose, such as mining, pulling any machine, or for occupation, and the land or house does not answer the purpose, the lessee is at liberty to rescind the lease, in case he could not with ordinary care discover the defect. In case of misrepresentation by the lessor

regarding the true state of the land or house demised, or in case of concealed defects in the property leased, which the lessee could not with ordinary care discover, the lessee is entitled to relief.

Clause (b).—Property.—Property includes the whole of the property comprised in the lease. If the lessor fails to put the lessee in possession of the property, the latter may sue for damages.

Clause (c).—This clause is not happily worded. It seems that the non-payment of rent or the breach of any covenant in the lease by the lessee will entitle the lessor to disturb the lessee's possession that is to say, to evict him at pleasure. That would be placing a most formidable weapon and means of oppression in the hands of the lessor. The fair construction would be that, as long as the lease is subsisting, the lessor, his heirs, and assigns, or any other person claiming by or under him, them, or any of them, will not be able to disturb the lessee's quite possession.

Clause (d).—The true presumption as to encroachment made by a tenant during his tenancy upon the adjoining lands of his landlords is that the lands so encroached upon are added to the tenure, and from part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord, unless it is clearly appeared by some act done at the time that the tenant made the encroachment for his own benefit. This is the clear rule of English law, and it is a rule which is supported by reason and principle.—Goroo Das v. Issur Chunder, 22 W. R. 246.

Clause (e),—If a man stipulates to pay rent, it is clear he engages to pay it as a compensation for the use of the land rented. According to English law a tenant is entitled to abatement in proportion to the quantity of land washed away, and he is entitled to that abatement in suit brought by the landlord for arrears of rent.—Afsurooddeen v. Shorashi, Marsh 558.

Glause (f).—Bound to make.—By an express stipulation in the lease or on principles of natural law and equity, according to the nature of the property leased if the lessor neglects to make repairs or payment, the lessee cannot set aside the lease, but can, advance money to do the same, and can recover it from the lessor.

Clause (h).—A tenant of land demised to him cannot, on the termination of his tenancy, claim compensation for buildings erected by him. But the tenant may, at any time during the lease, remove all fixtures, whether ornamental or for the purpose of trade or manufacture or agriculture, provided he leases the property in the state in which he received it. But the property in trees growing on land is, by the general law, vested in the proprietor of the land subject, of course, to any custom contrary,

Clause (t).—As regards emblements, it is provided that, when a lease of uncertain duration determines otherwise than by lessee's

fault, he or his representatives may take all the crops planted or sown by him, and growing on the property at the determination of the tenancy.

Clause (i).—In the absence of any contract to the contrary all the tenancies from year to year were non-transferable, where they were created before the passing of the Transfer of Property Act. But under this clause in the absence of any express simpulation, the lessee may transfer absolutely the whole or any part of his interest in the property.

Clause (k). - Cf. s. 55, sub-s. (5), clause (a).

Clause (/).—The tender must be unconditional and not under protest. It must also be at the proper time and place, such as the village cutchery of the landlord. It should be made either to the landlord, or to his express or implied agent who generally collects rent. In Bengal, payment or tender may be made by rent moneyorder.

Clause (n).—It is the duty of the lessee to protect the property let out to him. If he fails to do so he is liable for damages,

Clause (o).—The tenant is prohibited from using the property in a manner, which is not only inconsistent with the purpose for which it is let, but may be also different from it.

Clause (p).—The tenant cannot erect pucca building without the landlord's consent. The tenant may be restrained from doing it by an injunction. But if the landlord stands by without any objection until the completion of the work, he is estopped from demolishing it.—Noyuna v. Rupikun, 9 C. 609.

Clause (q).—If the tenant sublet the property, and the subtenant wrongfully holds over and refuses to quit, the lessor may recover from the lessee, as special damage, the cost of ejecting the sub-tenant, and damages for the use and occupation of the property by the sub-tenant during the period for which he was kept out of possession.

#### Section 109.

Note.—S. 108 (j) provides that the lessee may assign his interests, and this section provides that the lessor's assignee will possess all the lessor's rights. By s. 108 (j) the lessee does not cease to be subject to any of the liabilities attaching to the lesse, and it comes as a matter of course that, if the lessor so elects, he may acknowledge the transfer, and may hold the lessee's transferee liable to all the liabilities attaching to the lease. This section provides that, if the lessee so elects, he may hold the transferee of the lessor liable to all the liabilities attaching to the lease.

The relation of landlord and tenant is the result of a deliberate contract, and that contract is in respect of certain immoveable property. The rights and liabilities of the lessor and the lessee under the contract are such as touch and concern the property leased, and hence the contract may be said, in terms of the English law, covenant running with the land.

#### Section 110.

Anniversary.—If the term commences from any day of any year, such as, the 15th March 1890, it will last during the whole day of the 15th March 1891 or of any other year according to the contract, because from excludes the day of commencement, and hence term must be computed from the 16th March of the year of commencement to the 15th March of the appointed year.

#### Section 111.

Clause (a).—Where a lease is for a fixed term, it determines at the end of that term, and it is being well known to the tenant that his lease has determined, it is not necessary to serve him with a notice to quit.

Clause (b).—Where the condition of the lease is that the lessee to be entitled to hold the land as long as he pleases, it determines by the death of the lessee.—Vaman v. Maki, 4 B. 424.

Clause (c).—For example, a lease by a childless Hindu widow determines on her death if it is not granted for any legal necessity.

Clause (d).—This is known as the law of merger, vide Notes under section for.

Clause (e).—A surrender may be made without any writing. But the lesser and the lessee must be competent to contract according to the provisions of the Contract Act—Imambandi v. Kamaleswari, 14 C. 109. It is not open to a tenant to relinquish a mukurrurree or permanent lesse at his pleasure (19 C. 493).

Clause (f).—Mere non payment of rent for some years does not operate as a surrender, or does not extinguish the right of occupancy 2 A. 517.

Clause (g).—Mere breach of covenant does not involve forfeiture unless there is a provision for re-entry in case of a breach of that condition—2 A. 437.

Where the denial of landlord's title is the cause of action, the denial must be prior to the institution of the suit, otherwise the suit will be premature. It frequently happens that the landlord at first brings a rent-suit against the tenant, and after the disclaimer by the tenant of the landlord's title, the landlord withdraws from the rent-suit, and subsequently brings a regular suit for khas possession.

Clause (h).—A suit for ejectment is not maintainable unless the tenancy has been determined by service of notice on the tenant. This clause applies where the tenancy can be determined at the option of the parties.

#### Section 112.

Note.—Where the lessor knowingly accepts rent due since the forfeiture, it is construed that his intention was to keep the lease subsisting. But when the action has once commenced, no subsequent conduct will defeat the suit on the ground of waiver.—14 C. 176.

#### Section 113.

Note.—This section lays down the circumstance under which a notice is waived. It is a well established rule of law that a tenancy may be continued after the expiration of the time named in the notice.

### Section 114.

Note.—This section gives power to the Court to give relief against forfeiture for non-payment of rent.

#### Section 115.

Note.—"This section proceeds on the principle that a man is not permitted to derogate from his own grant. The lessee therefore cannot by surrendering his lease affect the interests which he has created in favour of sub-lessees. Apart from this principles, inasmuch as there is no privity of estate between the lessor and an under-lessee. the determination of the latter's interest is the necessary consequence of the legal determination of the lease by whatever act or event that may be brought about. For instance the under-lessee's interest is determined by a notice duly given to the lessee only in cases where the lessee's interest is so determinable. But a voluntary surrender by the lessee stands on a different footing. It operates as an assignment to the lessor of the surrenderor's interest, but does not necessarily extinguish that interest for all purposes. Accordingly if a zemindar accepts the relinquishment of a putni he places himself in the position of an assignee of the putnidar, and in no better position, as regards the subordinate interests which the putnidar has created. In effect the under-lessee is in case of a voluntary surrender, no more prejudiced by it than an assignee of the lease would be."-Shep. and Brown's Transfer of Property Act.

# Section 116.

Note.—If the lodgings be kept beyond the term for which they are let, a new term commences for which the tenant is bound to pay full rent, whether he occupy them during the whole term or not. If

the new tenancy be created by holding over, notice to quit must be given according to s. 106 if the landlord wishes to determine it.

#### Section 117.

Note.—The provisions of this chapter apply to the tenancy of the homestead land of all other classes of tenants as are defined in the Bengal Tenancy Act, except of a raiyat, which includes (a) a raiyat holding at fixed rate, (b) an occupancy raiyat, (c) a non-occupancy raiyat.

### CHAPTER VI.

### Section 118.

Note.—This chapter applies to moveable as well as to immoveable property, and supplies the omission of the Contract Act. An exchange can be effected like a transfer by sale, that is to say, a registered assurance is necessary in the case of an exchange of land of the value of one hundred rupees and upwards.

#### Section 119.

Note.—Two remedies are open to the suffering party, he may either sue for compensation in damages, or may rescind the contract. The right under this section is not a personal right, and may be available by any party to whom the thing received in exchange may be transferred.

### Section 120.

Note.—Cf. ss. 37-55, 73-75, 93, 94, 97-107 of the Contract Act, which are applicable in cases where the things exchanged are moveable, and s. 55 of this Act is applicable where the properties exchanged are immoveable.

### Section 121.

Note.—In transactions of any kind where money passes as such, it is presumed that the money is good, and the payment of false money by the purchaser of goods is no payment.

# CHAPTER VII.

# Section 122.

Requisites.—The requisites of a gift are:—(1) There should be a donor and donee; (2) the subject of gift must be existing, and capable of transfer; (3) the gift should be made voluntarily

and without condition; and (4) there should be transfer on the part of the donor and acceptance on the part of the donee.

Acceptance.—Acceptance is a necessary condition of a valid gift. This chapter has not laid down any rule as to how acceptance should be made. As a gift is made for the benefit of the donee, it is generally presumed that absence of dissent may be fairly construed as a consent, regard being had to the surrounding circumstances; because according to the accepted principle of the English law, a person may be presumed to assent to that which benefits him, and to which he, in all probability, would have assented if the opportunity were given him. But, if the fact of the gift be not brought to the notice of the donee as in the case of a gift by a registered instrument without delivery of possession; then no such presumption can arise.

If the donee be a minor, or otherwise disqualified for acceptance, then the gift may be accepted by his guardian, or some other qualified person as trustee, on his behalf. If the donor or donee dies before acceptance, the gift is void.

### Section 123.

Note.—In case of immoveable property a gift cannot be effected by the mere delivery of possession, even in the case where the value of the property is less than one hundred rupees (see s. 54). On the contrary, delivery of possession is not a condition for effecting a gift. If the donor makes a gift of his property by a registered instrument duly executed, but retains its possession in himself, still the donor, on the basis of the registered instrument. In case of moveable property, registered instrument is equivalent to delivery of possession for the purpose of making a valid gift. See Act III. of 1877, s. 17, clause (a).

Eindu and Mahomedan Law.—Assuming that delivery of possession was essential under the Hindu Law to complete a gift of immoveable property, that law has been abrogated by this section. The first paragraph means that a gift of immoveable property can be effected by the execution of a registered instrument only, nothing more being necessary. The same is the case under the section with regard to moveable property, provided that a registered deed be adopted as the mide of transfer (Dharmdas v. Nistarini, 14 C. 446). But this section does affect any rule of Muhammadan Law, according to which a valid gift may be effected by delivery of possession, without any instrument, either written or written and registered.—Vide s. 129, infra.

# Section 124.

Note.—A valid gift involves the idea of the existence of the property which is the subject of the gift. Future or after-acquired

property of the donor cannot be the proper subject of a gift, though they may be the subject of a valid contract of sale.

#### Section 125.

Note.—The validity of a gift depends upon transfer on the part of the donor and acceptance on behalf of the donee. If, therefore, any one of the joint donees does not accept, his share cannot go to the other sharers, because they cannot be expected to accept what was never given to him.

#### Section 126.

Note.—A gift is a complete transfer so far as the donor is concerned. It cannot be revoked at the mere will of the donor. It may be made contingent on the happening of any specified event not depending upon the will of the donor. There cannot be any motive or consideration for the gift, and hence the condition must be wholly independent of the will of the donor.

#### Section 127.

Note.—Cf. ss. 66, 1c9 and 110 of the Indian Succession Act (X. of 1865).

A single transaction cannot be divided and hence the transaction must be accepted as a whole or rejected altogether.

In separate and independent transactions of gift, the donee can separately accept any of the gifts, and the donor cannot object to it, because he made each gift voluntarily and without consideration, and he did not expect the discharge of any obligation unconnected with the separate and independent gift.

# Section 128.

Note.—This section is very important. It makes, independently of the provisions of s. 53, an acceptor of a gift of the entire property of the donor personally liable for the debts due by the donor to the extent of the value of the property comprised in the gift.

Section 129.

Note.—The provisions of this chapter do not affect any rule of Muhammadan law. It is not meant that none of the provisions of this chapter will apply to the Muhammadans, but it simply enacts that, when any of the provisions of this chapter will conflict with any rule of Muhammadan law, the latter will prevail. According to the Muhammadan law a written instrument or registration is not necessary for the purpose of making a valid gift, but an oral gift accompanied by seisin and delivery of possession is valid as well.

#### Section 130.

Actionable claim .- Actionable claim means a claim to any debt, other than a debt secured by mortgage of immoveable property, or by hypothecation or pledge of moveable property; or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existing, accounting, conditional or contingent (S. 2 of Act II. of 1900). This definition has been so worded as to cover the "chose in action" of the English lawyer. A chose in action or property in chattels in action is where a man has not the enjoyment of the thing in question, but merely a right to recover it by action. So, if a man covenants with one to do any act, and fails in it, whereby I suffer damage, the recompense for the damage is a chose in action. So this definition does not include, (1) a mortgage-debt, (2) a mere right to sue, (3) an equitable interest in immoveable property and (4) a claim for liquidated damage.

#### Section 131.

Note.—The object of notice under this section is the protection of the assignee. Non-service of express notice therefore does not render a suit liable to dismissal, because, after the institution of the suit, the debtor becomes aware of the assignment, and, from the moment when he becomes so aware, the transfer comes into operation.

Notice to legal holder by assignee of chose in action is necessary to perfect title as against third person. Such notice is tantam unt to possession. If the assignee omit to give that notice, he is guilty of the same degree and species of neglect as he who leaves a personal chattel to which he has acquired a title in the actual possession and under the absolute control of another person.

# Section 132.

Note.—Transfer for value without notice is not a good defence in such a case.

# Section 133.

Note.—Every transfer is not a guarantee of solvency of the debtor. So where the assignee fails to recover the debt from debtor, he cannot fall back upon the assignor in the absence of express warranty of solvency of debtor.

# Section 134.

Scope.—This section contemplates of cases where a debt is the subject-matter of a mortgage. When a debt is transferred by way of mortgage, the mortgager as well as the mortgager has the right of

realising the debt from the debtor in accordance with the covenant in the deed. If the debt so transferred be time-barred, or because otherwise irrecoverable through the wilful default of the mortgagee, he be liable for the loss,

#### Section 137.

Note.—Negotiable instruments have been saved from the operation of this chapter.

# NOTES ON

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# Indian Majority Act.

# PREAMBLE.

Age of majority before the passing of the Act.— Until the passing of the Indian Majority Act there was no uniform age of majority. The age of majority of Hindus and Mahomedans was determined by the provisions of their respective laws, modified under certain circumstances by English legislation, while the limit of the minority of European British subjects, and other inhabitants of Bengal, was derivable from other sources of law.—Trevelyan's Law Relating to Minors, p. 2.

Minority of Hindus.—According to the Bengal School a boy attains majority on the first day of his sixteenth year. But according to the Benares and the Mithila School a boy attains majority at the end of the sixteenth year. This also is the limit of minority for persons subject to Jain law.—Ibid, p. 4

Minority of Mahomedans.—According to the Mahomedan law a person becomes an adult on the expiration of his or her fifteenth year, unless symptoms of puberty appear at an earlier age. The earliest age which the law can presume for the appearance of the symptoms of puberty is twelve years for boys, and nine years in the case of girls. Below those age puberty cannot be presumed to have appeared in the respective cases.

European British Subjects.—Before the passing of Act IX. of 1875, the age of majority of European British subjects was regulated by the English law, which fixe; the limit of minority at the end of the twenty-first year, and in the term "European British subjects" are included not only such British subjects as have themselves migrated to and become domiciled in India, but also all their legitimate descendants, however remote their descent. The mere possession of an English name will not apparently be sufficient to justify the inference that the person possessing it is a European British subject. There must be a distinct descent from a person of European extraction who has migrated to India.—Trevelyan's Law Relating to Minors, p. 24.

East Indians and Native Christians.—This rule would apparently also apply to East Indians, to native Christians who had

renounced the old law by which they were bound and to Jews, and also in fact to all persons other than Hindus and Mahomedans. With respect to illegitimate children of native women by European British subjects, the limit of their minority would be determined by the Hindu, Mahomedan or English law, according as they had been brought up as Hindus, Mahomedans, or Europeans.—Ibid.

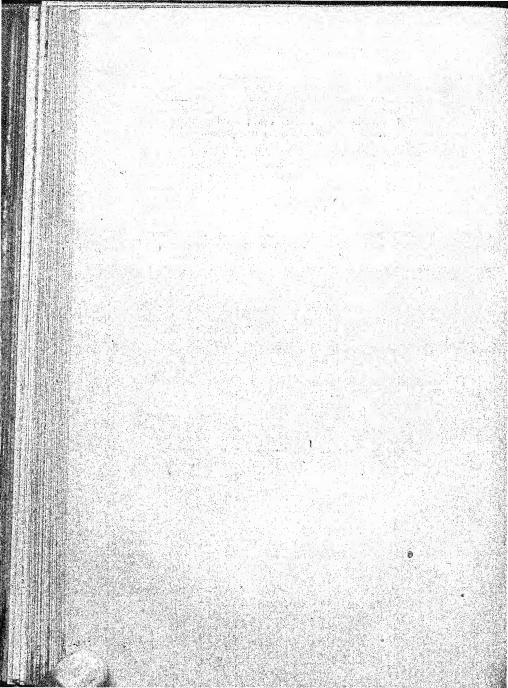
Uniformity as to the age of majority.—In the preamble it is stated that the purpose of this Act is to prolong the period of non-age and attain a more uniformity and certainty respecting the age of majority that now exists. But in other acts the definitions of minor have been given. So it may have been the intention of the framers of the Indian Majority Act to fix the ages of eighteen and twenty-one, respectively, as the periods of the attainment of majority for all purposes; but as the 'Act stands, it is difficult to see what effect it has on those Acts in which the words "mior" is specially interpreted for particular purpose.—Vide Trevelyan's Law Relating to Minors, p. 30.

#### Section 2.

Will.—Under s. 2 of the Majority Act, the capacity to make a will is not safe-guarded, the only exception being in the cases of marriage, dower, divorce and adoption.—Harduasi v. Gosmi, 8 A. L. J. 385.

# Section 3.

Testamentary Guardian.—Where a person who by his father's will is made guardian of his minor brother, applies for and obtains probate of the will, the grant of probate only establishes the authority of his appointment. Such a guardian is not one "appointed by a Court of Justice" within the meaning of cl. 1, sec. 3, Act IX. of 1875, and the minor attains majority on his completing the age of eighteen years.—Fogesh v. Umatara, 2 C. L. J. 577.



# NOTES ON INDIAN CONTRACT ACT.

# PREAMBLE AND PRELIMINARY.

#### PREAMBLE.

When the Act came into operation.—The general rule of law is that a contract is always to be judged according to the positive law which subsists at the time when it was concluded. The Indian Contract Act became law on the 1st September 1872 and as such can have no retrospective effect (Dulabhdass v. Ranlal, 5 M. I. A. 109; Omda Khanum v. Brojendra Kumar, 12 B. L. R. 451.)

Scope of the Act.—Contract Act does not profess to be a complete code dealing with the law relating to contracts. It purports to do no more than to define and amend certain parts of that law. [The Irrawaddy Flotilla Company v. Bugwandas, 18 C. 620=18 I. A. 121 (P. C.)]. It only defines and amends certain parts of the law relating to contracts. Section 1 of the Act distinctly saves the provisions of all Statutes, Acts or Regulations not expressly repealed by this Act. Neither any usage nor custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act is hereby affected.

Territorial Application,—Vide Foot Note under section to the Act.

# Section 1.

British India.—British India shall mean all territories and places within Her Majesty's dominions which are for the time being governed by Her Majesty through the Gevernor-General of India or through any Governor or other officer subordinate to the Governor-General of India.—Vide General Clauses Act, X. of 1897, s. 3 (7). The Act applies to all people and races within British India.—Madhub v. Rajkumar, 14 B. L. R. 76.

Heactments saved by the Contract Act—Act XXXII, of 1839—Payment of interest.

Act XXXII, of 1854—Conveyances of Land.

Act XXVIII. of 1855—Usury Laws.

Act IX, of 1856—Bills of Lading.

Ind. Con. Act.-r.

Act I. of 1859-Seamen's Contract.

Act XIII. of 1859-Workmen's Breach of Contract.

Penal Code, Chapter XIX.—Criminal Breaches of Contract,

Act III. of 1865-Contract with Common Carriers.

Act XXI. of 1866. Act III. of 1872. Contracts of Marriage.

Act XXVI. of 1881-Negotiable Instrument.

Act XXI. of 1883-Emigration.

Act IX. of 1890-Indian Railways.

The Chapters and Sections of the Transfer of Property Act (IV. of 1882) which relate to contracts are, in places in which that Act is in force, to be taken as part of Act IX. of 1872.—See Act IV. of 1882, s. 44.

Statutes not repealed.—The Statutes not expressly repealed are still good law:

Customs, etc. saved by the Act.—(a) Pre-emptien whereever it exists. (b) Maritima law where questions of bottomry etc.,
are concerned. (c) Attorney's Lien. (d) Several provisions of
Hindu and Mahomedan law, unless in direct contravention of the
Act. (e) Customs and usages regarding Negotiable Instruments. (f)
The rule of Hindu law that arrears of interest exceeding in amount
the principal debt are not recoverable in the whole of the Bombay
Presidency and in the Ordinary Original Civil Jurisdiction of the
Calcutta High Court; and (g) The English Common Law relating to
carriers.

Usage.—The word "usage" would include what the people are now or recently in the habit of doing in a partiucular case. (E. Dalelish v. Guzuffur, 23 C. 427.

Oustom.— A custom in order to be a good one must be definite, certain, reasonable, invariable and universal.

# Section 2.

Interpretation.—The obligation of a Contract is an obligation created and determined by the will of the parties. Herein is the characteristic difference of the contract from all other branches of law. The business of the law, therefore, is to give effect, so far as possible to the intention of the parties.—Encyclopidia Britanica, 10th Edition, Vol. XXVII., p. 220; 15 C. L. J. 332.

# Foreign Contracts—

- (a) Capacity.—With regard to capacity to contract, which is generally regarded as the natural consequence of adult age, the English authorities are still discordant. In cases of capacity to enter into mercantile contract, the older authorities are in favour of the lex loci, and the question has not arisen in recent years.
- (b) Formalities.—The forms and ceremonies which the law of the place of celebration requires for the constitution of a contract are necessary and sufficient for the purpose but the rules of evidence must be determined by lex fori. But the general rule, that formalities are governed by lex loci does not however apply to contracts which concern immoveable property, as to which the lex situs prevails.
- (c) Legality.—The legality of a contract depends generally upon the law of the place of intended performance.
- (d) Performance.—The performance of a contract, when a special place for performing it is expessly or impliedly agreed upon, is regulated as to the mode, time and conditions by the law of that place.—Foote's Private International Jurisprudence.
- Clause (d) Consideration.—Consideration according to English law is something done, forborne, or suffered, or promised to be done, forborne, or suffered by the promise in respect of the promise. It must necessarily be in respect of the promise, since consideration gives to the promise a binding force. So (1) it must be of some value in the eye of the law, although it need not be adequate to the promise; (2) it must be legal; and (3) it must be either present or future, it must not be past. In India it is not necessary that the thing done must be done by the promisee, it may be done by any other person; in the second place under the English law the consederation must have some value in the eye of law but in India no such thing is required and lastly, in England a consideration must be either present or future and it must not be past but in India past act is a good consideration.

Clause (e) Agreement.—Clause (e) says that "every promise and every set of promises, forming the consideration for each other, is an agreement." A promise as we read in Clause (e) is an agreement; for the words "forming consideration of each other" in Clause (e) cannot qualify the words "every promise:" they relate to the words "every set of promises." Moreover, it involves no straining of language to speak of a promise as an agreement; for an agreement does not necessarily imply consideration.—Abaji Sitaram v. The Trimbok Manicipality, 28 B. 66.

Agreement according to English law is "the expression by two or more persons of a common intention to affect their legal relations." So according to English law (1) agreement requires for its existence at least two parties. (2) The parties must have a distinct intention and

this must be common to both. (3) The parties must communicate to one another their common intention. (4) The intention of the parties must refer to some legal relations, i. e., it must contemplate the assumption of legal rights and duties as opposed to engagements of a social character. (5) Lastly the consequences of Agreement must affect the parties (Anson's Contract). According to Indian law an accepted proposal or promise is an agreement. So in order to determine whether a valid agreement exists or not we must determine whether there was a valid proposal and whether that proposal was accepted.

Void agreement.—Void agreement is that which is not enforceable by law, because it fails to satisfy some requirements of the law of the country in which they are made, although it intended to affect legal relations.—Anson's Contract, p. 4.

Contract.—An agreement which is enforceable by law is a contract. We have already seen that an accepted proposal or offer or a promise is an agreement. So an essential feature of contract is a promise by one party to another, or by two parties to one another, to do or forbear from doing certain specified acts. A proposal or an offer must be distinguished from a statement of intention; for a proposal or offer imports a willingness to be bound to the party to whom it is made.—Anson's Contract, p. 5.

To make that sort of offer or proposal which results in contract, there must be (t) an offer or proposal, (2) an acceptance of the offer or proposal, and (3) the law must attach binding force to the promise, so as to invest it with the character of an obligation.—Anson's Contract, p. 5.

Voidable Contract.—A voidable contract is a contract with a flaw of which one of the parties may, if he please, take advantage. So it is a valid contract until rescinded. It takes its full and proper legal effect unless and until it is disputed and set aside by some person entitled so to do.—Pollock's Principles of Contract, p. 8.

Void Contract.—According to the English Law an agreement or other act which is void has from the beginning no legal effect at all, save in so far as any party to it incurs penal consequences, as may happen where a special prohibitive law both makes the act void and imposes a penalty. Otherwise no persons' rights, whether he be a party or a stranger, are affected. (Pollock's Principles of Contract, p. 8). \*" Strictly speaking a void contract is a contradiction in terms; for the words describe a state of things, in which despite the intention of the parties, no contract has been made. Yet the expression however faulty is a compendious way of putting a case in which there has been the outward semblance without reality of contract." (Anson on Contract, p. 14). But this difficulty does not arise in India where a contract which was enforceable at a certain time now ceases to be so enforced is termed a void contract. (Vide s. 56)

of the Act). But void agreements and void contracts must not be confused. It seems that void agreements under Indian law and void contracts of English law contemplate the same thing.

# CHAPTER I.

#### Section 3.

Communication.—In order to constitute proposal acceptance etc., there must be something more than a mere mental assent. Some thing must be done to signify his intention to the other party, i. e., it must be communicated to the other party.

#### Section 4.

Communication when Complete.—An offer or its acceptance must be communicated to the party by words or conduct, communication of an offer is complete when it comes to the knowledge of the person to whom it is made. A proposes by letter to sell a house to B at a certain price. The communication of the proposal is complete when B receives the letter. But the difficulty arises in cases like this:—X offers a promise for an act. A does the act in ignorance of the offer. Can he claim performance of the promise when he becomes aware of its existence. The answer according to Indian law is, "no." But in the English case of Williams v. Corwardine, 4 B and A 621, it was held that A was entitled to it, although the report is silent as to her knowledge of the offer. But in an American case it was held that a reward cannot be claimed by one who did not know that it had been offered.—Vide Anson's Contract, p. 24.

Communication of acceptance.—According to Indian law the communication of an acceptance is not complete, at the time, against both the contracting parties. It is complete as against the proposer when it is put in the course of transmission to him, so as to be out of the power of the acceptor. B accepts A's proposal by a letter sent by post. The communication of acceptance is complete as against A, when the letter is posted. It is complete as against the acceptor when it comes to the knowledge of the proposer. So B can if he likes after posting the letter revoke it by a telegram which would reach A before he gets the letter of acceptance. Because the acceptance is not binding upon B until A receives the letter of acceptance. But after the letter of acceptance is once posted, A can do nothing in way of revocation, because the letter of acceptance when it is once out of the power of the acceptor is binding upon the proposer. So before it is accepted by B, A can revoke his offer. Also, according to the English law an offer is not communicated until it is brought to the

knowledge of the offeree, while an acceptance may be held to be communicated, and the contract made though the acceptance has not come to the knowledge of the offeror. So a contract is completed, beyond possibility of revocation, when the letter of acceptance is posted. As soon as the letter of acceptance is "delivered to the post office the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offeror himself as his agent to deliver the offer and receive the acceptance. So it seems that in the above illustration as soon as B posts the letter it is binding both upon A and B. But it is not so under the Indian law. It is binding only upon the proposer A. So according to the English law a contract is made where the acceptance is communicated; and the Court having the jurisdiction over the place where the contract is accepted is to try such a case because cause of action arises there.

Communication of revocation.—According to our Indian law revocation is complete as against the person who makes it, when it is put into a course of transmission to the person to whom it is made so as to be out of the power of the person who makes it as against the person to whom it is made, when it comes to his knowledge. B revokes his acceptance by telegram: B's revocation is complete, as against B, when the telegram is despatched, and as agaist 4 when it reaches him. But according to English law revocation of an offer is not communicated unless brought to the knowledge of the offeree. So according to Indian law (1) the revocation of a proposal is complete. as against the proposer when it is put into a course of transmission to the acceptor; (a) the revocation of a proposal is complete as against the acceptor when it comes to his knowledge; (3) the revocation of an acceptance is complete as against the acceptor when it is put into a course of transmission to the proposer. But according to English law (1) the revocation of an offer is complete as against proposer as well as against offeree when it is brought to the knowledge of the offeree; under the English law there cannot be any revocation of acceptance because acceptance is complete as against both as soon as a letter is posted or the proposer is made known of the intention of the acceptor.

#### Section 5.

Revocation.—A proposal may be revoked at any time before communication of its acceptance is complete as against the proposer that is, up to the time of posting letters, in case of acceptance by letter. The English law is also the same. So also under the Indian law an acceptance can be revoked at any time before or at the inoment when the letter communicating it reaches the proposer; but not afterwards. But in English law "acceptance concludes the contract, so if acceptance takes place when a letter is put i not the post office, a telegram revoking the acceptance would be inoperative though it reached the offeror before the letter. It is not easy to see how the English Courts

could now decide otherwise. Nor is it easy to see that any hardship need arise from the law as it stands. The offeree need not accept at all: or he may send a qualified acceptance; 'I accept unless you get a revocation from me by telegram before this reaches you.'"—Anson's Contract, pp. 34-35.

#### Section 6.

Communication of Notice.—According to Indian law the communication of notice of revocation is to be made by the proposer to the other party, otherwise it is not a valid communication but according to the English law it is as yet uncertain as to the source whence notice of revocation must come—Vide Anson's Contract, pp. 42-44.

Death, insanity, etc.—Under English law the death of either party before acceptance causes an offer to lapse. An acceptance communicated to the representatives of the offeror cannot bind them. Nor can a representative of a deceased offeree accept the offer on behalf of his state. But under the Indian law an offer lapses when it comes to the knowledge of the offeree. So before that it can be accepted i.e., it can be accepted by the offeree after the death of the proposer and before he had any knowledge of his death.

#### Section 7.

Absolute and unqualified.—It is clear that in order to convert a proposal into a promise the acceptance must be absolute and unqualified. That is to say, until there is such an acceptance the stage of negation has not been passed and no legal obligation is imposed. Similarly, any departure from the terms of the offer or any qualification vitiates the acceptance it accompanies, unless it is agreed to by the person from whom the offer comes. In other words an acceptance with a variation is no acceptance: it is simply a counter-proposal, which must be accepted by the original promisor before a contract is made.—Haji Mahomed v. E. Spinner, 24 B. 510.

Sub-section (2).—It does not mean qualified acceptance, For that is distinctly prohibited by 1st sub-section. It simply means that acceptance should be made in the manner prescribed by the proposal, i. e., it should be in writing, if writing is specified, or comply with some other requisitions if those are mentioned.

# Section 8.

Criticism.—Here, again, says Dr. Stokes, the definitions seem to have been forgotten. If the explanation of reciprocal promises (s. 2, cl. f.) is here substituted, s. 8 becomes meaningless—Anglo Indian Codes, Vol. I. p. 550, note 5.

# Section 9.

Implied Contract.—" An implied promise n the sense of the Act is a real promise, though not conveyed in words. It must be distinguished from the promises frequently said in the English books

to be implied by law, which were fictions required by the old system of pleadings to bring cases of relations resembling those created by contract (sections 68—72 below) within the recognised forms of action, and sometimes to give the plaintiff the choice of a better from of action. "—Pollock and Mulla, p. 46.

# CHAPTER. II.

#### Section 10.

Cosideration.—The section does not suggest the inference that consideration is an essential element of an agreement because it contains the expressions "all agreements are contracts if." (among other things) "they are for a lawful consideration." By referring to section 25 of the Act, it is made clear beyond doubt that consideration is not an essential part of an agreement, because we have a provision that "an agreement made without consideration is void" except in the cases there indicated,—Abaji v. Trimarak Municipality 28B. 66.

#### Section 11.

Personal Law.—It is by no means certain that there is any rule of International Law recognizing the lex loci Contractus as governing the capacity of the person to contract, but that assuming such a rule to be established, the specific limitation of the Indian Majority Act (IX. of 1875) to "domiciled person" necessarily excluded its application to European British subjects not domiciled in British India; that s. 11 of the Contract Act must be interpreted as declaring that the capacity of a person in point of age to enter into a binding contract was to be determined by his own personal law wherever such law was to be found; that this rule is not affected by the Majority Act so far as concerned persons temporarily residing, but not domiciled, in British India, whose contractual capacity was still left to be governed by the personal law of their personal domicile; and that such law in the case of European British subjects is the common Law of England, which 'recognized twenty-one as the age of majority-Rohilkhand and Kumaon Bank v. V. Row, 7A. 490.

Contract by Infants.—Under the English law contracts by minors are only voidable, but under this Act they are wholly void.—

Mohori v. Dharmodas, 30 C. 539.

Soundness of mind.—Under the English law a Contract by a lunatic is not void but only voidable but under this Act it is absolutely void.

Instances of disqualification from Contractors.—(1) A barrister is not allowed to enter into a valid contract for his fees, (2) contract by an alien enemy is void.

#### Section 12.

Contract by a person of unsound mind.—According to English law, a contract entered into with a lunatic by a person unaware of the lunacy is good if no unfair advantage has been taken, and the contract has been executed, so that the parties cannot be restored to their original position—(Molton v. Camroun, 2 Ex. 487). According to the above section, if once lunacy is established, the contract is void; and any person who has received money or other consideration is bound under s. 65 to restore it or to make compensation.

#### Section 13.

Principle.—It is of the essence of a contract that there should be (expressly or by implication) a proposal to which an unqualified assent has been given; without such assent there is no contract: the minds of the contracting parties are not at one.— $Da_6du$  v. Bhana, 28 B. 410.

### Section 14.

Reality of Consent.—The principal feature in the Formation of Contract which has to be considered is Genuineness or Reality of consent. Given an apparent agreement, possessing the element of Form or Consideration and made between parties capable of contracting, was the consent of both or either given under such circumstances as to make it no real expression of intention? This question may have to be answered in the affirmative for any one of the following reasons:—(1) Mistake, (2) Misrepresentation, (3) Fraud, (4) Duress and (5) Undue influence.

#### Section 15.

Coercion.—C cercion corresponds to duress under English law, The chief points of difference between the two seem to be the following:—

1st.—To sustain the charge of duress, in English law, a man must show that his life or his liberty had been in eminent danger. The mere unlawful detaining, or threatening to detain goods is not enough.

and.—Under the present section the person coerced need not be the party whose consent is to be obtained. The coercion may be directed against any one whatever. Not so in English law.

3rd.—Coercion may proceed from any person. It is not necessary that the person from whom coercion proceeds should be the party who obtain the consent, or should be acting with his knowledge.

#### Section 16.

Scope of the Section.—The old section has been substituted by the present section. The object of the amendment was to extend the

scope of the amendment. By the amendment of s. 16 of the contract Act, the Legislature intended to embody in that section the rules enforced in this respect by the English Courts of equity, and among them the rule that a transaction may be so unconscionable and the extortion so great as to be evidence of undue influence. The substituted definition of undue influence includes within its scope cases which did not fall within the section as it originally stood.—36 M. 533.

#### Section 17.

Fraud.—Fraud is a false representation of fact made with knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing to act upon it.—Anson's Contract, p. 180. But mere silence is not fraud, except where there is no duty to speak. Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an alloument or a purchase of shares, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation. There must be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false.—Psek v. Gumey, L. R. 6 H. L., p. 403.

#### Section 18.

Misrepresentation.—In the first place, the misrepresentation in order to be a ground of relief must be of semething material, constituting an inducement of motive to the act or omission of the other party, and by which he is actually misled to his injury—Sanjiv Roy's Contract Act, 250.

# Section 19.

Romedies.—A person whose consent to an agreement has been obtained by coercion, undue influence, fraud or misrepresentation, has the following courses open to him—

- (a) he may avoid the agreement and sue for damages; or, if the case can be brought within s. 35 of the Specific Relief Act, sue to have the contract rescinded;
- (b) he may refuse to carry out the agreement and defend a suit brought against himself on it for damages or for specific performance;
- (c) he may treat the agreement as valid and sue for specific performance, claiming also personnance of the matter as to which mistepresentation has been made, or damages in respect thereof.—Cunningham's Contract Act, p. 80.

#### Section 19A.

Scope.—"We have recast the language of the news, 19A of the Act 1872 proposed by cl. 3 of the Bill, so as to bring it more closely into accord with the language of s. 19. A contract obtained by undue influence is on a different footing from a contract obtained by fraud. In the case of the latter, a party who, with knowledgle of the fraud, has taken any benefit under the contract, is held to have elected to affirm it; but where a contract has been obtained through the exercise of undue influence, it is necessary that the Court should have power to relieve the party who acted under the undue influence, even although he may have received some benefit under the contract. On the other hand, where such benefit has been received the Court ought to have full power to impose such conditions as may be just upon the party seeking relief."—Select Committee's Report.

#### Section 20.

Mistake of Fact.—In the cases given in the illustrations the agreement is void, because such an agreement presupposes the existence of the thing; its validity is conditional upon the existence of an assumed state of facts, and if that fails the whole transaction falls to the ground.—Cunningham's Contract Act, p. 85.

# Section 21.

Mistake of Law.—There are two kinds of mistake, namely, (1) mistake of fact and (2) mistake of law. The law presumes that every man knows the law, when he knows the fact. This presumption though arbitrary and false, is based upon reasons of public policy. Under the Indian Contract Act, section 21, error of law does not vitiate a contract, much less will it annul a conveyance after a lapse of many years, unless there has been some fraud or misrepresentation and an absence of negligence.—Vishnu v. Kashi, 11 B. 174.

# Section 22.

Illustration.—If a known, described, and defined article is ordered of a ma nufacturer, and that known, described, and defined article is actually supplied, the contract is not voidable, although the buyer thought it would answer a particular purpose, and it did not.—Chanter v. Hopkins, 4 M. and W. 399,

# Section 23.

Unlawful consideration.—The following considerations are not lawful;—(1) which is forbidden by law; (2) which is of such a nature that if permitted, it would defeat the provisions of any law; (3) which is fraudulent; and (4) which involves or implies injury to the

person or property of another, or the Court regards which as immoral or opposed to public policy

Forbidden by Law.—We find instances of contract forbidden by law in ss. 26, 27, 28, 30, infra.

Defeat the provision of any law.—Illustration (i) to the section affords example of such transaction.

Fraudulent.-Fraud always vitiates a contract.

#### Section 24.

Principle.—"The general rule is that, where you can not sever the illegal from the legal part of a covenant, the contract is altogether void: but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."—Pickering v. Ilfracombe, R. C. L. R. C. P. 250; 9 B. 176; 15 B. L. R. 5 (Ap.); 9 B. L. R. 441.

#### Section 25.

Principle.—"The reason why the law enforces only those promises which are made for a consideration is that gratuitous, promises are often made rashly and without due deliberation, and that, therefore, if promises made without consideration were enforceable, there would be a risk of man's binding himself without any deliberate intention to do so. Another mischievous consequence of the enforcement of such promises would be the frequent preferences of voluntary undertakings to the claim of real creditors. The exceptions from the general rule are, as will be seen, cases in which the formalities observed and the relations of the parties are such as to rebut the probability of inadvettence or rashness suggested prima facile by the absence of consideration."—Canningham's Contract Act.

# Section 26.

Scope.—The terms of the section are so wide as to make one hesitate to understand the words used in their literal sense. They not only narrow down the wholesome provisions of the English law upon the subject; but if the words were to be understood literally, they make those agreements void, which are not only not against public policy, but which it is the duty of the Legislature and the Courts of Justice to favour and encourage. Take for example, the case of a married Hindu, who can legally marry a dozen wives, and in whose case polygamy cannot, in the eyes of the Courts in India, be regarded as either immoral or against public policy: Suppose he agrees with his first wife or her parents not to marry a second wife while the first was living. Is this agreement void? If it is, the framers of the Act could hardly have intended it.

Principle.—A contract in restraint of marriage has been declared void on ground of public policy. A reciprocal engagement between a man and woman to marry each other is unquestionably good. But a contract, which restrains a person from marrying at all, or from marrying any body, except a particular person, without enforcing a corresponding reciprocal obligation on that person, is treated as mischievous to the general interests of society, which are promoted by the encouragement and support of suitable marriages. Courts of equity have in this respect followed, although not to an unlimited extent, the doctrine of the Civil law, that marriage ought to be free.—Story's Enquity Jurisprudence.

#### Section 27.

Scope.—Section 27 of the Indian Contract Act provides that every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. To the general rule thus laid down in broad and comprehensive terms, three exceptions are specified; viz., the case of an agreement at the time of a sale of good will, the case of an agreement between partners prior to dissolution, and the case of an agreement between partners during continuance of partnership.—Sheikh Kallu v. Ramsar, 13 C. W. N. 88=9 C. L. J. 216.

English Law.—In the course of time the strict doctrine of the early English law was relaxed in the English Courts and agreements in restraint of trade were classified under three heads, viz,—(1) where the restraint was unlimited as to both time and space; (2) where it was limited as to time but unlimited as to space; and (3) where it was limited as to space but unlimited as to time. In the first and second cases, the agreement was void while in the third it was valid. In recent times however, the law has been developed on entirely new lines and it has been ruled that the sole test of the validity of a contract in restraint of trade is its reasonableness in the interest of the covenantee to which the provise must be added that the covenant must not otherwise offend against public policy.—Sheikh Kallav v. Ramsar, 13 C. W. N. 388=9 C. L. J. 216.

# Section 28.

Scope.—It seems to me that the prohibition contained in the section is limited to agreements in restraint of legal proceedings for enforcing "rights under or in respect of any contract," which must be understood in the sense in which the Act defines it, and cannot be held to include rights under a decree.—Pir Mahmood J: Ram Ghulam v. Janki, 7 A. 124.

The section only refers to contracts which wholly or partially prohibit the parties absolutely from having recourse to a Court of

Law. The first exception in the section applies only to a class of contracts where the parties have agreed that no action shall be brought, until some question of amount has first been decided by the arbitrators. Semble: A suit will not lie to enforce an agreement to refer to arbitration, even in the case referred to in the first exception to s. 28 of Act IX. of 1872.—The Coringa Oil Co. v. Koegler, I C. 466.

Agreement not to appeal.—Where, in consideration of A giving B time to satisfy a decree against him held by A, B agreed not to appeal against the decree, and did appeal: Held that the agreement was not pronibited by s. 28 of Act IX. of 1872, and that the Appellate Court was bound by the rules of justice, equity and good conscience to give effect to it and to refuse to allow to proceed with the appeal which he had instituted in contravention of it.—Anant Das v. Ashborne, I A. 267.

#### Section 30.

Wager.—To constitute a wager, the transaction between the parties must "wholly depend on the risk in contemplation," "and neither must look to anything but the payment of money on the determination of uncertainty." But, if one of the parties has "the even in his own hands," the transaction lacks an essential ingredient of a wager.—Dayabhai v. Lakhmi. 9 B 363; "Jugger Nath v. Ram Dayal, 9 C. 791. In order to constitute a wagering contract neither party should intend to perform the contract itself, but only to pay the differences. In order to ascertain the real intentions of the parties the Court must look at all the surrounding circumstances and will even go behind a written provision of the contract to judge for itself whether such provision was inserted merely for the purpose of concealing the real nature of the transaction.—Perosia v. Manshji, 22 B. 899.

# CHAPTER III.

# Section 31.

Contingent Contract.—Every contract constitutes a relation between the parties to it and rights arising out of that relation, but it does not follow that every contract creates a right immediately enforceable. The right created may be one which the parties agree shall be enforceable only on the happening of some future event, as to which neither of the parties makes any promise, and which is (to use the words of the section) collateral to the contract, its import being merely to mark the moment at which a right created by the contract becomes enforceable. Such contract are termed "contingent." The event upon which they are contingent may be wholly beyond the

power of the parties, as where a promise is made contingent on the death of some person; or, as illustration (c) to section 32 and the illustration to section 34 show, it may be more or less within the power of one of the parties. The material point is that it is collateral to the contract and forms no part of the reciprocal promises of which the contract consists. It is in this respect that contingent contracts differ from contracts such as those referred to section 51, where the obligation to perform on the one side is conditional on readiness and willingness to perform on the other. In the latter the matter on which the enforceability of the contract depends is not collateral to the contract, but a part of the contract itself.—Cunningham's Contract Act, 136.

#### Section 32.

Note.—Contingency contemplated in this section is occurrence of an event; whereas the contingency contemplated in section 33 is the non-occurrence of an event.

#### Section 34.

Note.—This section explains how an event becomes impossible. According to the English law also if A, before the time of performance arrives, make it impossible that he should perform his promise, the effect is the same as though he had renounced the contract.—Anson's Contract, 310.

Illustration.—The case put in the illustration has the appearance of one in which the thing to be done by the one party is the consideration for the promise of the other. The Court of Chancery does not consider that the marrying of the person named is an event rendered impossible by a marriage to another person; and therefore a gift made dependent on such an event is not forfeited but merely suspended by another marriage.—Cunningham's Contract Act.

# Section 35.

Note.—Two kinds of contract are contemplated under this section. In one case the contract becomes void if a specified event does not happen within a certain time; and in the second case the contract becomes enforceable by law if a specified uncertain event does not happen within a fixed time.

# Section 36.

Note.—Even if the parties are ignorant of the impossibility, the agreement is void.

### CHAPTER IV.

Performance of Contract.—It remains to consider the modes in which the contractual tie may be loosed, and the parties wholly freed from their rights and liabilities under the contract. The modes in which a contract may be discharged are these:—(a) It may be discharged by the same process which created it, mutual agreement.

(b) It may be performed; the duties undertaken by either party may be thereby fulfilled, and the rights satisfied. (c) It may be broken; upon this a new obligation connects the parties, a right of action possessed by the one against the other. (d) It may become impossible by reason of certain circumstances which are held to exonerate the parties from their respective obligation. (e) It may be discharged by operation of rules of law upon certain sets of circumstances.—Anson's Contract, p. 290.

#### Section 37.

Note.—This section contemplates the discharge of contract either by performance or by operation of rules of law under certain circumstances. Cases in which performance is excused are mentioned in the Act under sections 39, 41, 48, 51—56, 62, 63, and 67. There are other laws as well which excuse performance.

Death of Promissor.—Generally in all cases of contracts, the obligation survives the death of the promissor and binds his representatives. The following are examples of the contracts that are discharged by death—(a) Promises to marry; (b) Contracts of service generally; (c) Contracts of agency; (d) Ordinary contracts of apprenticeship; and (e) Contracts of partnership.

# Section 38.

Offer of performance.—Under section 38 of the Contract Act, a tender must be unconditional and made at a proper time and place and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do. This rule is perfectly good notwithstanding anything contained in the Bengal Tenancy Act.—Sati Prased v. Manmatha, 18 C. W. N. 84.

Liegal Tender,—Legal tender; as regards coinage and currency notes, is regulated by the Indian Coinage Act XXIII. of 1870, 55. 12, 13, 14; and the Indian Paper Currency Act, Act XX. of 1882, s. 16. No gold coin is a legal tender in payment or on account generally, the tender of a cheque is not good. But where the landlord of a house through his agent sent in rent-bills to his lessee, and the lessee gave the agent a cheque payable to her attorney for the

amount demanded, and the attorney realized the amount of the cheque and gave the money to the agent, who tendered it to the landlord's attorney, who refused to accept, and the money was returned to the lessee's attorney, it was held in a suit for rent, that, under the circumstances, the tender amounted to payment.—Bolye Chand v. Moulaw, 4 C. 572.

# Section 39.

Scope.—Section 39 of the contract Act only enacts what was the law in England and in India before the Act was passed, namely, that where a party to a contract refuses altogether to perform, or is disabled from performing his part of it, the other party has a right to rescind.—Soltan Chand v. Schiller, 4 C. 252.

But it is submitted that the illustrations as well as the words of the section show that the section applies to breaches that take place after the contract has been partially performed. In such cases the rules of English law is different. It considers, in each case, where the breach has been such as to go to the essence of the contract and to render the whole nugatory and valueless; or whether it has been such that the contract may still, though in a decree more or less modified, be substantially carried out,—Cunningham's Contract Act.

# Section 40.

Object.—When considerations connected with the person with whom a contract is made form a material element of the contract, it may well be that such a contract on that ground alone is one which cannot be assigned without the promisor's consent, so as to entitle the assignee to sue him on it.—Toomey v. Ram Sahai, 17 C. 40.

# Section 41.

Where one makes a payment in the name and on behalf of another without authority, it is competent for the creditor and the persons paying to rescind the transaction at any time before the debtor has affirmed the payment, and repay the money, and thereupon the effect of the payment, is at an end, and the debtor remains responsible.—Walter v. James, 40 C. J. Ex. 104.

# Section 42.

Taking together sections 42, 43 and 45 we find that the Legislature has declared against the common law rule of survivorship as well in the case of joint creditors as in that of joint debtors. Further in section 44 the Act has abolished the rule of English law according to which the release of one joint debtor operates to release his codebtors. For the proposition that the Legislature intended to go Ind. Con. Act,—2.

beyond this and refuse recognition altogether to rights or liabilities in solidum, we do not think there is any foundation.—Barber Moran v. Ramana, 20 M. 461.

#### Section 43.

Construction of the Section,—"This section is peculiar. It permits the promisee to compel any one of several joint promisor to perform the whole promise. It is very difficult to say what this means. But whatever may be the true construction of the section, it cannot be taken to prevent an obligor upon a joint bond by five from doing what he could have done before this (on a contract between Hindus out of Calcutta), namely, in a suit brought against all the co-obligees to claim a decree against three of them for three-fifths of the debt.—Mahtab Singh v. Saodooram, 25 W. R. 419.

#### Section 44.

Hinglish Law.—Generally speaking a release to one of several joint promisors released all. But a party may give a qualified release, and discharge one and reserve his right of action against the other.—North v. Wakefield, 13 Q. B. D. 541.

A release of one of two judgment-debtors who are made jointly liable for the amount of the decree does not discharge the other from liability.—Kiam Ali v. Kayamaddi, 6. C. L. R. 212.

# Section 46.

Under s. 46 of the Indian Contract Act where by the contract a promisor is to perform his promise without application by the promisee and no time for performacce is specified, the enagement must be performed within a reasonable time and under that section what is a reasonable time in each particular case a question of fact.—Lachmi v. Deoki, 19 Ind. Cas. 752.

# Section 49.

Where no specific contract exists as to the place where payment of the debt is to be made, it is the duty of the debtor to make the payment where the creditor is.—Motifal v. Surajmul, 30 B, 167.

# Section 50.

Notes.—The illustrations given under the section are by no means exhaustive. There are other modes of valid payment as well. "The payment may be made not only in the current coin of the realm, but in any other medium that the creditor may choose to accept."—Ragha Shitaram v. Hari, 24 B. 619.

# Section 51.

Three kinds of Covenants.—There are three kinds of Covenants: 1. Such as are called mutual and independent, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favour, and where it is no excuse for the defendants to allege a breach of the convenants on the part of the plaintiff. 2. There are civenants which are conditional and dependent, in which the performance of one depends on the prior performance of another, and therefore, till this prior condition is performed, the other party is not liable to an action on his covenant. 3. There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and in these, if one party was ready, and offered to perform his part, and the other neglected to refuse or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act .- Fones v. Barkley, 2 Doug. 684.

Rule of Construction.—The general rule of construction with reference to these distinctions is that the dependence or independence of covenants was to be collected from the evident sence and meaning of the parties, and that, however transposed they might be in the deed, their presidency must depend on the order of time in which the intent of transaction requires their performance. - Jones v. Barkley, 2 Doug. 684. The following rules of construction, as to the intention of the parties, have been deduced from the times appointed for the performance of the respective covenants or promisees :- "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy and did not intendto make the performance a condition precedent : and so it is where no time is fixed for performance of that which is the consideration of the money or other act.

But when a day is appointed for payment, etc., and the day is to happen after the thing, which is the consideration of the money, etc., is to be performed, no action can be maintained for the money, etc., before performance.

Where two acts are to be done at the same time, as where A convenants to convey an estate to B on such a day, and in consideration thereof B covenants to pay A a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform his part though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sales.—

Portage v. Cole, 1 Wms. Saund. 320, rules 1, 2, 5.

Actual tender.—In a suit for damages for breach of a contract to deliver cotton, there was evidence that the plaintiffs had called on the defendant to perform his part of the contract by giving delivery, but that he had refused to do so and had repudiated the contract. The plaintiffs proved that they were ready and willing to carry out their part of the bargain and had made preparations with the object of having the money ready to pay for the cotton on delivery, Held, that under s. 51 of the Contract Act (IX. of 1872) they had done sufficient to entitle them to recover damages, and were not obliged to show that they made an actual tender of money.—Sriram v. Madangopal, 30 C. 805—8 C. W. N. 25 P. C.

#### Section 52.

Illustration.—When a ship-owner has contracted to give a certain notice to a charterer, or to do any other act, with a view to inform the charterer when the ship will be ready, the charterer is not bound to ship his goods until the ship-owner has given him that notice or has done that act.—Flaming v. Koegler, 4 C. 237.

### Section 53.

See sections 73 and 75.

For the "effect of neglect of promisee to afford reasonable facilities for performance," see s. 67.

For the "consequence of recission of avoidable contract," see s. 67, See Act XXVI. of 1881, s. 76.

# Section 54.

The plaintiff sued on a Hundi alone and the Hundi was found to be given on consideration of execution by plaintiff of a mortgage which failed. Held that under s. 54 of the Contract Act the Court should dismiss the suit. The Court has no right to give a decree for money due on a different consideration to that stated in the Hundi.—Sami Aiya Thevan v. Rangaiyengar, 3 M. L. T. 405.

# Section 55.

Scope.—S. 55 entitles a party to a contract, where time is of the essence of the contract, to say, if he is sued upon the contract, "time is of the essence of the contract, you have failed to comply with the stipulation as to time, I repudiate the contract." It does not enable the promissee to say "I elect to keep alive this broken contract in the hope that I may hereafter recover beavier damages for the breach of the contract than I should be entitled to recover at the time of the breach of the contract." The object of s. 55 is to protect the promises and is analogous to s. 39 as shown by the illustration to s. 39. This illustration is the statement of a case in which the promisee would be

at liberty to put an end to the contract; so under s. 55 where a stipulation entered into by the promisor, as to time which is of the essence of the contract, is broken, the promisee is entitled to repudiate or put an end to or avoid the contract. So s. 55 read with section 2 (i), means nothing more than this. On the promisor's failure to perform within the contract time, the promisor loses the powers to enforce the contract, that is, to claim any advantage due to himself thereunder. The promisee on the other hand, has the option of enforcing it or not as may suit him. He may drop it altogether, and in some cases it would be to his interest to do so. If he elects to "enforce" it he can only do so, by suing under s. 73 for damages for breach; for the contract itself, being for performance within a date, which is part, is impossible of execution in terms. The damages for which he can obtain compensation under s. 73 are those "which naturally arose in the usual course of things for such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it, which cannot include any aggravation of damages caused by the promisee's action or inaction subsequent to the breach.-Muthaya Manigaran v. Lakku, 22 M. L. J. 413.

English and Indian Law.—English Common Law generally deemed stipulation as to time to be of the essence of the contract, But time in equity is not generally deemed to be of the essence of a contract, unless the parties have so treated it, or unless an agreement to that effect is implied from the nature and circumstances of the contract, or unless the fact was ingrafted into it by notice subsequent, express, and unequivocal. The same principle is formulated in s. 55 of the Contract Act.—Kishan Prosad v. Purendu, 16 C. W. N. 753=15 C. L. J. 40.

Where time is essential of a contract.—The nature of the subject of the contract may impliedly make the time of completion essential, as in the following cases:—

- (1) Where property is wasting or running out, as household interests and mines.
- (2) Where property is sold for immediate application to manufacturing or commercial purposes that do not admit of delay. In this case it must be shown that the vendor somehow knew the purpose for which the property is wanted.
  - (3) Where there is a sale of a public house as a going concern.
  - (4) Where the subject of contract is a life annuity.
  - (5) Where the contract is about the sale of reversionary interests.
- (6) Where there is a sale of stock or shares, which are subject to fluctations of value.
- (7) Where an option to purchase is given to be exercised at a ertain time.—Fatechand's Contract Act.

Waiver of delay.—Delay is waived by—(1) continued negotiation (Hudson v. Burtram, 3 M. 440); (2) Acquiescence and (3) where the delay is caused by a party himself, he cannot object to it on that ground.

Section 56.

Impossible.—For the purpose of s. 56, impossible may include what has become impracticable.—Rajaram v. District Board of Tanjore, I M. W. N. 686.

Para. 2.—The rule contained in paragraph II. of this section rests upon the ground that it is not reasonable to suppose that the legislature, whilst altering the condition of things with reference to which the convenantor contracted, intended that he should remain liable on a covenant, which the Legislature itself prevented his fulfilling.—Raja Kishore Singh v. Seth Jethmal, 14 C. P. L. R. 138.

Para. 3.—Where the impossibility is known to the parties at the time of making the agreement, it seems obvious that there can be no intention of performing it on the one side, and no expectation of performance on the other, and therefore the essential of a valid promise in regard to such act are wanting.—Leake's Digest of the Law of Contracts, p. 686.

Illustration.—In Illustration (b) the parties are assumed to be those that regard marriage as a contract. Amongst Hindu lunacy is no legal inpediment. In Illustrations (c) and (d) the impossibility is legal.

# Section 57.

Note.—This section assumes that the two sets of promises are quite distinct. If they are not, s. 24 applies.

# Section 58.

Scope.—This section does not apply in a case where there is no alternative promise capable of being separated altogether from the illegal portion of the agreement. The illustration to this section show clearly the class of cases to which it is intended to apply.—Hussain v. Fahan, 18 Ind. Cas. 5.

# Section 59.

Payment.—The general rule of law is, that a person who pays money has a right to apply that payment as he thinks fit (Addison on Contract, p. 1211). S 50 recognizes the broad principle that, where one man cwes several different debts to another, and makes a payment to the creditor, he is entitled to and has the option to say to his creditor, "you must apply this particular sum that I now pay to a particular eebt," and if the creditor accepts the payment, so must the money be

applied. S. 59 further provides that, if the payment is made under circumstances implying that it is to be applied to the discharge of a particular debt, it must be applied accordingly.—Bansidhhar v. Akhay Ram, A. W. N (1890) 62.—See also the case of Mahomed v. Ganga, 15 C. W. N. 443. P. C.

#### Section 60.

Scope.—As I understand the section, it says that, if the debtor has neglected to exercise the option committed to him when making the payment to his creditor, "and there are no other circumstances showing to which debt the payment is to be applied," then the creditor has the right of application mentioned in the concluding portion of the section. But it is to be observed that, before he can exercise that right, there must exist no other circumstances indicating to which debt the payment is to be applied—Per Straight, J., in Bansidhar v. Akhay Ram, A. W. N. (1890) pp. 62, 63.

Payment of Interest.—Under s. 60 of the Contract Act the creditor has a discretion to appropriate a payment either to the principal or the interest of his debt both debts being due to him. It is for the debtor to show that he had acted in such a way in respect of this payment as to limit this discretion of his creditor.—Nirpat v. Shadi, A. W. N. (1881) p. 119.

Other circumstances. - See I. L. R., 13 Cal. 164.

# Section 61.

The well known rule laid down in Clayton's case (1 Mar. 572) that payments credited on one side of an account, should, in the absence of any specific appropriation go to discharge in order of date, the earlier items on the debit side is not an arbitrary and inflexible rule, but that it may be modified or departed under special circumstances.—Nicholas v. Wilson, 3 C. L. R. 361. In the absence of any direction the interest is to be paid first of all.—Maharaja of Benares v. Har Narain, 28 A. 25.

# Section 62.

Contracts which need not be performed.—Contracts may be discharged by the same process which created it, mutual agreement. And this mode of discharge may occur in one of three forms: waiver; substituted agreement; condition subsequent. A contract may be discharged by such an alteration in its terms as substitutes a new contract for the old one. The old, contract may be expressly waived in the new one, or waiver may be implied by the introduction of new terms or new parties.—Anson's Contract.

Scope.—A liability upon a contract whether in writing or not, can wholly or partially be discharged by a subsequent verbal agreement.

The result of 63 illus. (b) being, that each party to a contract may, without consideration, release the whole or a portion of the other party's promise, it would appear to follow that an agreement under section 62 to rescind or alter a contract need not be supported by consideration, and accordingly it does not fall within the Scope, s. 25.—Cunningham and Shepherd's Contract Act. S. 62 of the Contract Act is merely a legislative expression of the Common Law, and the provisions thereof do not apply to a case where there has been a breach of the original contract before the subsequent agreement is come to.—Monohur v. Thakur, 15 C. 319.

#### Section 63.

Scope.—The present section lays down a very sensible rule, and that is that the release of performance, if the person who has a right to claim the performance so desires it, may be without any consideration whatever.—Nanjappa v. Nanjappa, 12 M. 76.

#### Section 64.

Person.—Person means such a person as is referred to in section II, that is to say, a person competent to contract, who is of the age of majority according to the law to which he is subject.—Brahmo v. Dharma, 26 C. 381.

It is however, clear that a person who has a right to avoid a contract if he like must do so as soon as he possibly can, for the parties must be placed in the same position as if the contract had never been made.—Muhammad v. Ottayil, 1 Mad. H. C. 390.—See also 3 C. L. J. 260.

#### Section 65.

Scope.—S. 65 of the Indian Contract Act (IX. of 1872) provides for the restitution of any advantage received under a contract or agreement. The section preserves the distinction between agreement and contract which is maintained throughout the Act. The section speaks generally of an agreement discovered to be void without any express reference to the cause or origin of the void character, so that an agreement which is void by reason of a principle of law would not on that account fall outside the scope of the section. -Gulab Chand v. Fulbai, 33 B. 411. This section deals with two classes of cases, first, an agreement which is discovered to be void, and secondly, a contract which becomes void. There is clearly a distinction between the agreements in the first case and the contract in the second case. The first deals with agreements void ab initio; the second with contracts which becomes void after they have become contracts, (11 Bom, L. R. 693). But this section does not apply where the object of the agreement was illegal to the knowledge of the party at he time it was made. Natha Khan v. Sewak, 15 C. W. N. 408.

# Section 66.

Note. - Vide ss. 4, 5, 6.

#### Section 67.

Note.—The onus is upon the promisor to prove that he had been prevented from paying it by the absence of reasonable facilities,—4 M. L. T. 335.

# CHAPTER V.

Quasi-Contracts.—Obligation may arise from Quasi Contract. This is a convenient term for a multifarious class of legal relations which possess this common feature, that without agreement, and without delict or breach of duty on either side, A has been compelled to pay something which X ought to have paid or X has received something which A ought to receive. The law in such cases imposes a duty upon X to make good to A the advantage to which A is entitled; and in some cases of this sort, which will be dealt with later, the practice of pleading has assumed a promise by X to A and so invested the relation with the semblance of contract.—Anson's Contract, p. 8.

#### Section 68.

Note.—This section contemplates a kind of legal relation which is termed Quasi Contract in English law. The section refers only to necessaries supplied to a person incapable of contracting (such as minors, persons of unsound mind, etc.,) or to any one whom he is obliged to support. It does not therefore provide for necessaries supplied to any one whom a person capable of contracting is bound or is supposed liable to support, e. g., necessaries supplied to the children of a man capable of contracting.—Sutherland's Contract Act, p. 144.

Liability.—Here only the property of the minor, lunatics, etc. would be liable.

Necessaries,—There is no definition of necessaries in the Act. "Things necessary are those without which au individual cannot reasonably exist. In the first place, food, raiment, lodging, and the like. About these there is no doubt. Again, as the proper cultivation of the mind is as expedient as the support of the body, instruction in art or trade, or intellectual, moral; and religious information, may be a necessary also. Again, as man lives in society, the assitance and attendance may be the subject of the infant's contract. Then the classes being established, the subject-matter, and extent of the contract may vary according to the state and condition of the infant himself. His clothes may be fine or coarse according to his rank; his education may vary according to the station he is to fill;

and the medicine will depend on the ills with which he is afflicted. and the extent of his probable means when of age. So, again, the nature and extent of the attendance will depend on his position in society, and a servant in livery may be allowed to a rich infant. because such attendance is commonly appropriated to persons in his rank of life. But, in all cases, it must first be made out that the class itself is one in which the things furnished are essential to the existence and reasonable advantage and comfort of the Infant contractor. Thus, article: of mere luxury are always excluded, though luxurious. articles of utility are in some cases allowed. So, contracts for charitable assistance to others, though highly to be praised cannot be allowed to be binding because they do not relate to his own personal advantage. In all cases there must be personal advantage from the contract derived to the infant himself." - Per Alderson B. Chapble v. Cooper, 13 M. and W. 252. But under the Indian Act in the following cases the money was held to be spent for necessaries: -(1) Money advanced for the defence of a minor in a criminal proceedings. - Sham v. Debya, 21. C. 872; (2) Money spent for the marriage of the sister of the minor, Nundan v. Ajudhya, 32 A. 325 (F. B.); Fayram v. Mahadeb, 36 C. 768; (3) Cost for defending the property of the minor. -Watkins v. Dhunbooa, 7 C. 140; (4) Marriage expenses of the minor, Juggeswar v. Nilumber, 3 W. R. 2:7, etc.

#### Section 69.

Scope.—This section lays down a rule, which, though differing in terms, seems substantially to correspond to the rule of English law, according to which the action "for monoy paid to the use" of the defendant lies where the plaintiff has been compelled by law to pay, or being compellable by law, has paid, money which the defendant was ultimately liable to pay.—Cunn. and Shep.'s Contract Act. See also 16 C. L. J. 148, where it is said that this section applies where a party is only interested in the payment but is not liable to pay.

# Section 70.

Principle.—"Ss. 69 and 70 seem specially framed to meet cases in which, while no contract can be said actually to exist (and to imply one would involve a resort to legal fiction), justice and equity require that a person for whom an act has been done or money has been paid by another of which he enjoys the benefit such other not intending to do the act or make the payment gratuitously, should re-imburse or compensate the person doing such act or making such payment.—Nath v. Baij, 3 A. 66.

Scope.—Courts in India ought to be guided more by justice equity and good conscience than by English precedents and should not cut down the beneficient provisions of s. 70 of the Indian Contract Act. Under s. 70, the plaintiff should prove (1) that he

was doing something lawful when he was making the payment, (2) that he did not intend to pay gratuitously, (3) that what he did was done for the defendant, and (4) that the defendant did enjoy the benefit.

—Collector of Ganjam v. Srinivasa, 20 Ind. Cas. 445=25 M. L. J. 443.

#### Section 71.

Note.—Vide ss. 151 and 152 of the Contract Act. See also Act VI. of 1878 (Treasure trove).

#### Section 72.

"Coercion," meaning of.—S. 15 of the Contract Act forms part of a Chapter which specifically deals with the requisites of a valid contract. The definition of coercion in s. 15 applies only to the consideration whether there has been free consent to an agreement so as to render it a contract. The definition has no application to the word coercion as used in s. 72 of the Contract Act. The word is used in s. 72 in its general and ordinary sense as an English word.—Kanhaya Lai v. National Bank, 17 C. W. N. 541=13 C. L. J. 478

# CHAPTER VI.

Scope.—S. 73 of the Indian Contract Act prescribes the method of assessing the compensation due to a plaintiff suing upon a breach of contract, but it does not affect to extinguish or to limit a plaintiff's right to recover a determined sum due to him upon a contract which he for his part keeps on foot. If that is so, the mere absence from the Act of a special provision giving the remedy of a suit to recover the price cannot be construed as the distinct legislative withdrawal of that remedy.—P. R. & Co. v. Bhagwundas, 34 B. 192.

# Section 74.

Scope.—Under s. 74 of the Contract Act the Courts are not bound, even in cases where the parties to a contract in anticipation of a breach, expressly determined by agreement what shall be the sum payable as damages for the breach, to award such sum for a breach, but may award for the same "reasonable compensation" not exceeding such sum —Nait Ram y. Shibdat, I. L. R., 5 A. 238.

As a general principle, compensation must be commensurate with the injury sustained. Acting upon this principle, when the injury consists of a breach of contract, the Court would assess damages with a view of restoring to the injured party such advantage as he might reasonably be expected to have derived from the contract had the breach not occurred,—Ibid.

and the medicine will depend on the ills with which he is afflicted. and the extent of his probable means when of age. So, again, the nature and extent of the attendance will depend on his position in society, and a servant in livery may be allowed to a rich infant. because such attendance is commonly appropriated to persons in his rank of life. But, in all cases, it must first be made out that the class itself is one in which the things furnished are essential to the existence and reasonable advantage and comfort of the infant contractor. Thus, articles of mere luxury are always excluded, though luxurious articles of utility are in some cases allowed. So, contracts for charitable assistance to others, though highly to be praised cannot be allowed to be binding because they do not relate to his own personal advantage. In all cases there must be personal advantage from the contract derived to the infant himself." - Per Alderson B. Chapple v. Cooper, 13 M. and W. 252. But under the Indian Act in the following cases the money was held to be spent for necessaries:-(1) Money advanced for the defence of a minor in a criminal proceedings. - Sham v. Debya, 21 C, 872; (2) Money spent for the marriage of the sister of the minor, Nundan v. Ajudhya, 32 A. 325 (F. B.); Fayram v. Mahadeb, 36 C. 768; (3) Cost for defending the property of the minor. -Watkins v. Dhunbooa, 7 C. 140; (4) Marriage expenses of the minor.-Juggeswar v, Nilumber, 3 W. R. 217, etc.

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Scope.—This section lays down a rule, which, though differing in terms, seems substantially to correspond to the rule of English law, according to which the action "for monoy paid to the use" of the defendant lies where the plaintiff has been compelled by law to pay, or being compellable by law has paid, money which the defendant was ultimately liable to pay.—Cunn. and Shep.'s Contract Act. See also 16 C. L. J. 148, where it is said that this section applies where a party is only interested in the payment but is not liable to pay.

# Section 70.

Principle.—"Ss. 69 and 70 seem specially framed to meet cases in which, while no contract can be said actually to exist (and to imply one would involve a resort to legal fiction), justice and equity require that a person for whom an act has been done or money has heen paid by another of which he enjoys the benefit such other not intending to do the act or make the payment gratuitously, should re-imburse or compensate the person doing such act or making such payment.—Nath v. Baij, 3 A. 66.

Scope.—Courts in India ought to be guided more by justice equity and good conscience than by English precedents and should not cut down the beneficient provisions of s. 70 of the Indian Contract Act. Under s. 70, the plaintiff should prove (1) that he

was doing something lawful when he was making the payment, (2) that he did not intend to pay gratuitously, (3) that what he did was done for the defendant, and (4) that the defendant did enjoy the benefit.

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# CHAPTER VI.

Scope.—S. 73 of the Indian Contract Act prescribes the method of assessing the compensation due to a plaintiff suing upon a breach of contract, but it does not affect to extinguish or to limit a plaintiff's right to recover a determined sum due to him upon a contract which he for his part keeps on foot. If that is so, the mere absence from the Act of a special provision giving the remedy of a suit to recover the price cannot be construed as the distinct legislative withdrawal of that remedy.—P. R. & Co. v. Bhagwundas, 34 B. 192.

# Section 74.

Scope.—Under s. 74 of the Contract Act the Courts are not bound, even in cases where the parties to a contract in anticipation of a breach, expressly determined by agreement what shall be the sum payable as damages for the breach, to award such sum for a breach, but may award for the same "reasonable compensation" not exceeding such sum.—Nait Ram v. Shibdat, I. L. R., 5 A. 238.

As a general principle, compensation must be commensurate with the injury sustained. Acting upon this principle, when the injury consists of a breach of contract, the Court would assess damages with a view of restoring to the injured party such advantage as he might reasonably be expected to have derived from the contract had the breach not occurred.—Ibid.

Penalty and liquidated damage.-Where the terms of a contract specify a sum payable for non-performance, it is a question of construction whether this sum is to be treated as a benalty or as liquidated damages. The difference in effect is this-The amount recoverable in case of a penalty is not the sum named, but the damage actually incurred. The amount recoverable as liquidated damage is the sum named as such. In construing these terms a Judge will not accept the phraseology of the parties; they may call the sum specified "liquidated damages," but if the Judge finds it to be a penalty, he will treat it as such .- Anson's Contract, p. 288. This section, it will be observed, does away with the distinction between a penalty and liquidated damages; and this must be borne in mind in dealing with cases decided before the Contract Act, many of which turned upon this distinction under this section, whether a sum would formerly have been held a penalty or liquidated damages, if it be named in the contract as the amount to be paid in case of breach, it is to be treated, much as a penalty was before, as the maximum limit of damages. Now the Court is to award a reasonable sum not exceeding the sum named.-Dilbor v. Juysri, 3 C. W. N. 43; Mackintosh v. Crew, 9 C. 689; Baij v. Shah, 14 C. 252.

Explanation 1.—The explanation, appears to have been introduced to meet the decisions to the effect that when the higher rate of interest is payable as from the date of default and not as from the date of the contract, the contract rate is enforceable. The explanation read by the light of illustrations shows that it is for the Court to decide on the facts of the particular case whether the stipulation is or is not a stipulation by way of penalty.—Abbakke v. Kinhiamma, 29 M. 491.

Exception.—Bond given must be under the provision of any law in order to come under this exception. So where it is given for the performance of public duty but not under the provision of any law it does not come within the exception.—The President of Taluk Board v. Burde Lakshni, 31 M. 54.

# Section 75.

Notes.—Vide ss. 19, 39, 53 and 54. As regards marriage contract—vide 21 B. 23.

# CHAPTER VII.

# Section 77.

Price.—The word "price" is capable of being understood either as money or any other recompense in value, it is clear from the illustrations to s, 78 of the Contract Act that it is used in the former sense. In regard to the sale of goods "the price must consist of money paid or provided."—Roy's Contract, p, 185.

#### Section 84.

Oriticism—"It is rather difficult to see why this is a separate section; the proposition appears to be subordinate to the principle laid down in s. 83. Presumably it was intended to declare existing law, but to the present writer it seems by no means clear that the English authorities warrant the statement in this positive and unqualified form. However, the result is probably the same in almost every case that is likely to occur in the course of business. This section does not appear to have been judicially considered."—Pollock and Mulla's Contract Act, p. 308.

# Section 86.

Construction.—After the word "loss" in the section, the following words ought to be inserted, "not caused by the seller."—See ss. 151 and 161.—See Soshi Mohun v. Nobo Kristo, 4 C. 801.

#### Section 87.

Scope.—The preceding sections have dealt with the goods that are unascertained but existent at the time of the contract; whereas the present section deals with cases where goods are non-existent at the time of the contract.

But things which are not existing at the time of the contract, but which are said to have a potential existence, i. e., things which are the natural product or expected increase of something already belonging to the vendor, as a crop of hay to be grown on his field, may be sold. This section does not apply to them—Vide Misri v. Moshar, 13 C. 262; Bansidhar v. Sant, 10 A. 133; Baldeo v. Sahu, 31 C. 667.

# Section 88.

Object.—"The present section is intended merely to meet a doubt, which might otherwise have been suggested, as to contracts for the sale of non-existent or unascertained goods. Such contracts do not, as the preceding sections explain, operate to pass ownership, but they are non the less valid."—Cunn. and Shep.'s Contract Act.

# Section 89.

Note.—This section enacts as a rule of law what, under the circumstances of the case, must be presumed to have been the intention of the parties.—Hoodley v. Maczaine, 10 Bing. 82, where the illustration is taken from.

# Section 90.

Note,—Where there is a contract for the sale of ascertained goods, the property in the goods sold passes to the buyer when the

# Section 109.

Note.—This section is in accordance with the present title of law as laid down in Eichholz v. Bannison, 34 L. J. C. P. 105.—See also Framji v. Hormasji, 2 B. 258, 263.

This section has no application when the vendor is a Hindu or a Mahomedan lady.—S. A. 283 of 1892, decided on 19th May 1893 (unreported) (Allahabad).

#### Section 110.

Warranty.—" At the present day it is law, nearly, if not quite everywhere where the Common Law prevails, that any representation of fact as to the quality of the goods made for the apparent purpose of inducing the buyer to purchase them amounts to a warranty."—See 15 C. L. J. 19n. Warranty is nowhere defined in the Act. It is an "express or implied statement of something, which a party undertake shall be part of a contract, collateral to the express object of it."—Chanter v. Hopkins, 4 M. and W. 399.

#### Section 118.

Note,—Unless there is anything in the Contract to the contrary, a buyer cannot be compelled to take goods with allowance for an inferioriry.—Haridas v. Kalumall, 30 C. 649.

# Section 120.

Note,—Under s. 120 of the Contract Act, wrongful refusal by purchaser to accept the goods sold to him amounts to a breach of contract. So where a plaintiff agreed to sell and the defendants agreed to buy goods of a certain description and the property passed to the defendant by his assenting to the appropriation made by the plaintiff, held that the plaintiff was not precluded by s. 120, Contract Act, from suing, in the form, of an action for goods bargained and sold, for the price of the goods, on the defendant refusing to take delivery.—Finlay v. Radha, 36 C. 736.

# CHAPTER VIII.

Indemnity and guaranty.—Any promise to answer for the debt, default, or miscarriage of another person is a promise of guarantee or suretyship. It is always reducible to this form: "Deal with X and if he does not pay you, I will." This promise is not an indemnity, or promise to save another harmless from the results of a transaction into which he enters at the instance of the promisor. The case of Guild v. Conrad, 2 Q. B. 884 (1894) affords a good illustration of a guarantee, and of an indemnity. The plaintiff at the request of the defendant accepted the bills of a firm of Demarara, merchants

receiving a guarantee from the defendant that he would, if necessary, meet the bills at maturity. Later the firm got into difficulties and the defendant promised the plaintiff that if he would accept their bills the funds should in any event be provided. The first promise was a guarantee and the second an indemnity. "In my opinion," said Davey, L. J., "there is a clear distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter into a contract of liability, indemnified against that liability independently of the question whether a third person makes default or not." In a case of guaranty there must, in fact, be an expectation that another will pay the debt for which the promisor makes himself liable, and in the absence of such expectation the contract is not a contract of suretyship. So there must be three parties in contemplation; M, who is actually or prospectively liable to X and A, who in consideration of some act or forbearance on the part of X promises to answer for the debt, default or miscarriage of M .- Anson's Contract, p. 74.

# Section 124.

Note.—Contracts of indemnity, as understood in this Act, do not, comprise what, in English law, are the commonest instances of contracts of indemnity, namely, contracts of insurance.—See Shephard and Cunningham's Contract Act, 8th Edition, p. 297.

# Section 125.

Note.—In order to have a right of indemnity under this section, all the conditions laid down in it must he satisfied. Therefore, where a person has made a rash and improvident defence, he cannot recover his costs.—Wrightup v. Chamberlain, 7 S. E. 598; Gopal v. Bhowani, 10 A. 531. But where this is not so, he can recover his cost as between solicitor and client, and not merely as between party and party.

# Section 126.

Note.—Upon the construction of an agreement guaranteeing an employer against loss by the misconduct of a person employed as agent of the guarantor, held that the loss, to be recoverable in a suit against the guarantor, must be shown to have arisen from misconduct on the part of the agent in connection with the business of the agency and to be within the scope of the agreement.—Srikishen v. The Secretary of State for India, 12 C. 143. As to the meaning of surety, vide Rasik v. Singeshwar, 16 C. W. N. 1103.

# Section 127.

Note,—Illus. (c) assumes that there was no privity between C and that C acted merely as a Volunteer.

Want of consideration.—Where N advanced money to K on a bond hypothecating K's property, and mentioning M as surety for any balance that might remain due after realization of K's property, M being no party to K's bond, but having signed a separate surety bond two days subsequent to the advance of the money. Held that the subsequent surety bond was void for want of consideration under s. 127 of the Contract Act.—Nanak v. Melun, 1 A. 487.

Forbearance of claim—consideration.—The forbearance of a claim against a third person is a sufficient consideration for a surety bond, although there may be express contract by the obligee to forbear.—Fagadindra v. Chandra, 31 C. 242.

#### Section 128.

Note.—A creditor is not bound to exhaust his remedy against the principal debtor before suing the surety; and when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt.—Luchman v. Bapu, 6 B. H. (A. C.) 241; Sankana v. Virupakshopa, 7 B. 146. Surety to a bond passed by a minor is liable no matter whether the contract is void or voidable.—Kashiba v. Shripat, 19 B. 697.

Limitation.—If limitation has been saved by the principal, by paying interest, under section 20 it does not give a fresh start against the surety.—Gopal v. Gopal, 28 B. 248.

## Section 129.

Continuing guarantee.—The question whether a guarantee is a continuing guarantee must be decided "not upon the mere construction of the document itself without looking at the surrounding circumstances to see what was the subject-matter which the parties had in their contemplation when the guarantee was given. It is proper to ascertain that for the purpose of suing what the parties were dealing about.—Wood v. Priestner, 36 L. J. Ex., 42, 127.

# Seciton 130.

Surety under administration bond.—Surety under an administration bond is a continuing guarantee under section 129 supra; and as such when he is not a legatee, can apply for revocation.—Rajnarain v. Fulkumari, 6 C. W. N. 7=29 C. 68. But other High Courts held that he cannot be called a continuing guarantee and as such this section has no application in their case.—Surreya v. Ragammal, 28 M. 161; Kandhya v. Manki, 31 A, 56; see also Bai Somi v. Chokshi, 19 B. 245.

Notice.—The denial by a defendant of his liability in the pleadings cannot operate as a notice under section 130 of the Contract Act, because it was made for the purpose of pleading and could not have any other effect,—Bhikabai v. Bai Bhuri, 27 B, 418.

[nun Scope.—Revocation of surety applies only in cases of personal guarantee and not in case of pledging of property.—Narayanan v. Anmachellam, 19 M. 140.

# Section 131.

Note.—Compare s. 208. The English law seems to be different.—See Bradburs v. Morgan, 31 C. J. Ex. 462, where it was held that, without any notice to the creditor from the executor, the death of the surety, by itself, is no revocation of the continuing guarantee. For a case where s. 131 made room for the "intention of parties," see Gopal Singh v. Bhawani, 10 A. 531.

Son of a Hindu.—In a suit brought to recover money from the estate of a deceased Hindu in the hands of his son on a surety bond executed by his father, held that the estate of the son was liable according to the principles of Hindu law, and that the question was not affected by the provisions of the Contract Act.—Sitaramayya v. Venkataramana, 11 M. 373.

Co-sureties.—If a joint and several continuing guarantee is given by two persons and one of them dies, there can be no doubt that there, as in England, the survior must still remain liable.—Shepard's Contract Act, p. 395.

# Section 132.

Note.—If the creditor, being aware of the contract between the co-debtors, does any act which has the effect of discharging the surety, the debtor who is in fact a surety is hereby discharged from liability.—Punchanan v. Daby, 15 B. L. R. 331.

# Section 133.

English Law.—This section seems to go further than the English law. It can hardly have been intended that any and every variance, however insignificant and trifling, should operate as a discharge of the surety. According to the English law, only a material variance can have that effect.—Gardner v. Walsh, 24 L. J. Q. B. 285.

# Section 134.

Forbearance.—When the creditor did nothing which was in any way inconsistent with the rights of the surety, mere forbearance would not under s. 137 discharge the surety.—Maharaj Bahadur Singh v. Basunta, 17 C. W. N. 695.

A surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal.—Sankana v. Virupakshapa, L. R. 7 B. 146.

When creditor allows remedy to be time barrred. According to Bombay, Madras and Allahabad High Courts held that

in such a case surety is not discharged.—(Subramania v. Gopal, 33 M. 308; K-ishna v. Radha, 12 C. 330; Hajarimal v. Krishnarao, 5 B. 647). But the Allahabad High Court taking the contrary view held that in such a case the surety is discharged.—(Hazari v. Chuni, 8 A. 459; Radha v. Kinlork, 11 A. 310).

#### Section 135.

Acceptance of interest in excess.—In an action against a surety for principal and interest due on a promissory note, held that the creditor, by the mere acceptance, without the knowledge or consent of the surety, of interest in excess of what was due on the note, bound himself to give time to the principal debtor, and thereby discharged the surety.—Kali v. Ambika, 9 B. L. R. 261; Protab v. Gour, 4 C. 132; Gour v. Protab, 6 C. 241. But a mere gratuitous agreement on the part of the creditor to give time to the debtor does not discharge the surety because an agreement without considertion is not a contract.—Damodar v. Mahommed, 22 A. 351.

# Section 137.

Note. - Vide Notes under s. 134, supra.

#### Section 138.

Note. - Vide s. 44 supra, which covers the present section.

# Section 139.

Scope.—This section provides for two cases, that of an act on the creditor's part inconsistent with the right of the surety and that of an omission inconsistent with his duty towards the surety, the act or the omission having the effect of impairing the surety's remedy. The section may be contrasted with s. 134. That section, not referring to any duty on the creditors' part, deals with acts or omissions which result in the discharge of the principal debtor.—Cunningham and Shepherd's Contract Act, p. 407.

# Section 140.

Note.—In this section no distinction between securities existing at the time of the original contract and those subsequently acquired by the creditor; and this is in accorance with the English law.—Cunningham and Shepherd's Contract Act.

# Section 141.

Principle.—A surety who has paid the debt which he has guaranteed, has a right to the securities held by the creditor, because as between the principal debtor and surety the principal is under an obligation to indemnify the surety. The equity between the creditor

and the surety is that the creditor shall not do anything to deprive the surety of that right. But the creditor's right to hold his securities until his whole debt is paid is paramount to the sureties' claim upon such securities, which only arises when the creditors' claim against such securities has been satisfied.— Gobardhandas v. The Bank of Bengal, 15 B. 48; See also Mahammad v. Kalyan, 18 All. 189.

# Section 142.

Note.-Compare s. 19.

#### Section 143

Application of the section.—To justify the application, s. 143, it must be proved not only that there was silence as to a material circumstance, but the guarantee was obtained by means of such silence.—The Secretary of State for India v. Nilame, 6 M. 406.

# Section 144.

Note.—See s. 32, which covers this section. See s. 33, supra. Compare s. 133—See Cooper v. Evans, 36 L. J. Ch. 431. See Evidence Act, s. 92 (3), under which an oral agreement, such as is mentioned in the section is admissible as evidence, though the guarantee was in writing.

# Section 145.

Scope.—It will be noted that the suretys' right is to recover from the principal debtor whatever sum the former paid to the creditor, which sum ought to have been paid by the principal debtor. The principal debtor being bound to indemnify the surety, it is obvious that the cause of action cannot be merely the procuring, by the surety of the principal debtors' exoneration from liability to the creditor, but also the surety being himself damnified.—Pulli Narayan Murlti v. Manmutha, 26 M. 322.

# Section 146.

Note.—In the case of co-sureties it is well settled that if the creditor calls upon one of them to pay the principal debt or any part of it, that surety has a right upon principles of equity, to call upon his co-sureties for contribution.— Ibu Hossein v. Brij Bhukhan, 26 A. 407 (F. B.).

# Section 147.

English Law.—In England the co-sureties are liable pro rata according to the liability undertaken and the loss resulting; in India they are liable equally subject to the maximum of their obligation fixed by the cantract.

# CHAPTER IX.

#### BAILMENT.

#### Section 148.

Chapter on bailment not exhaustive.—No doubt, it (Act IX. of 1872) treats of bailments in a separate chapter. But there is nothing to show that the Legislature intended to deal exhaustively with any particular chapter or sub-division of the law relating to contracts.—The Irrawady Flotilla Co. v. Bugwandas, 18 C. 628 (P. C.).

Fxplanation.—A vendor who retains possession of the goods sold by him, but agrees to hold them as a bailee, thereby becomes a bailee.

#### Section 149.

Note. - Vide S. 90, supra.

#### Section 150.

Note.—A gratuitous lender of an article is not liable for injury resulting to the borrower or his servant, while using it, from a defect not known to the lender—Addision on Contracts. But not so, if the defect was known to the lender.—Blakemore v. Bris, 27 L. J. Q. B. 167.

Bailment for hire,—In the case of bailment for hire, the question of the bailer's knowledge does not arise. If there is a "defect," and the bailee suffers damage arising directly from such defect, even though the bailer be entirely ignorant of it, he must compensate the bailee. The liability of a bailer in this respect is somewhat like that of a vendor.

C. f .- Transfer of Property Act, s. 103 (a).

#### Section 151.

Note.—This section does away with the rather too fine distinctions of English law regarding the degrees of care required of bailees in different cases of bailment and puts the law, as far as India is concerned, on a simple and intelligible basis. The question of care "a" man of ordinary prudence would, under similar circumstances, take, etc., is a question of fact, and must be determined according to the circumstances of each sase.

Burden of proof.—The question of the burden of proof in cases of accidental injury to goods bailed depends upon the particular circumstances of each case. In some cases, from the nature of the accident it lies upon the bailee to account for its occurrence, and thus to show that it has not been caused by his negligence. In such cases it is for

him to give a prima facie explanation in order to shift the burden of proof to the person who seeks to make him liable. If he gives an explanation which is uncontradicted by reasonable evidence of negligence, and is not prima facie improbable, the Court is bound in law to find in his favour, and the mere happening of the accident is not sufficient proof of negligence.—Shield v. Wilkinson, I. L. R., 9 All. 398.

Common carriers.—Notwithstanding some general expressions in the chapter on bailments, a common carrier's responsibility is not within the Contract Act, 1872.—The Irrawady Flotilla Co. v. Bugwandas, I. L. R., 18 Cal. (P. C.) 620.

Scope.—The provisions of ss. 151 and 152 of the Contract Act embody in effect the common law rule as to the liability of bailee other than common carrier.—Kuverji v. G. I. P. Railway, 3 B. 109.

#### Section 153.

English Law.—The English law is thus laid down in Addism on the Law of Contracts, page 346:—If chattels have been bailed or let to hire for a certain term, and the bailee does an act which is equivalent to the destruction of the chattels, or which is entirely inconsistent with the terms of the bailment; if he sells or attempts to sell, the chattels, or to dispose of them in such a way as to put it out of his power to return them . . . , the bailment is at an end.

As to whether a hirer of goods can give a valid title io a bond fid purchaser.—See s. 108, supra:

# Section 154.

Note.—If the goods are used in any way inconsistent with the conditions of the contract, the ballee is liable to make compensation for any damage that may arise to the goods from or during such user. The damage need not be the direct result of such user. The ballee is liable, simply because he was bound to use the goods in accordance with the conditions of ballment.

#### Section 158.

Note.—Compare s. 70, supra.

"Necessary'' would probably be construed to mean reasonable.— Anglo Indian Codes, Vol. I., p. 624.

# Section 162.

Queere.—If s. 42 applies when there are joint bailors or joint bailees, and one of them dies.

If the gratuitous bailment is terminated by the death of the bailor under circumstances mentioned in the latter part of s. 159, it is submitted that the bailee ought to have the benefit of the provisions of the same section.

#### Section 164.

Note. - Compare this section with s. 109, supra.

#### Section 165.

Note.-This section is a great protection to the bailees.

Here the Act differs from the Civil law, the English law, the Hindu law, and the Muhammadan law,—Stoke's Anglo-Indian Codes, Vol. I., p. 625.

#### Section 166.

Note.—Read this section in connection with s. 164. A bailee has several liabilities which have already been enumerated in preceding sections. Justice requires that he must have security as well. Ss. 164—167 make ample but just provisions for his security.

Under s. 164, if the bailee suffers any loss owing to the bailor having no title, etc., the latter must make compensation to the former. S. 166 adds another security to it, and lays down that if the bailee in good faith, delivers the goods to the person who bailed them, he is not responsible to the true owner in respect of such delivery.

S. 117 of the Evidence Act provides as follows: No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it: nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license.

But Explanation II. provides: If a bailed delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

# Section 167.

Note.—This section allows a third person claiming the goods bailed, to institute a suit against the bailor and the bailee, for the purpose of stopping the delivery of the goods to the bailor.

It may be mentioned that under the English law a bailee may under the circumstances mentioned in the section, institute an interpleadear suit.

# Section 168.

Note.—Two classes of cases are contemplated in this section, namely; (r) Where the owner has offered a specific reward for the return of lost goods and (a) where no such specific reward has been offered. When the offer of reward is made the finder accepts the offer by finding the goods and so the contract is complete and a suit lies for the realisation of the offered reward or he may at his option

retain the goods until he receives the reward. But in cases where no such offer for reward is made and in the absence of an offer nothing can be accepted by the finder for finding out and preserving the lost goods; in such a case the finder has no right to sue. But to do justice to the finder in such a case this section makes some provision. The terms on which an owner can exercise his right of reclaiming his property, are the payment of any expenses to which the finder has been put.—Shephard and Cunningham's Contract Act.

#### Section 169.

When the owner cannot be found.—If a man has come into possession of an article innocently, but by a subsequent change of intention, be fraudulently retains the article, he is guilty of criminal misappropriation under the Penal Code.

It is the duty of the finder of a lost article to exercise reasonable diligence in finding out the true owner or else he might find himself

in the clutches of the Penal Code.

#### Section 170.

Entire Contract.—Where a person does work under an entire contract with reference to goods delivered at different times such as to establish a lien, he is entitled to that lien on all goods dealt with under that contract.—Miller v. Nasinylti's Patent Press, 8 C. 312.

Quantum meruit.—S delivered  $\mathcal{F}$  an organ to repair,  $\mathcal{F}$  promising to repair it for Rs. 100.  $\mathcal{F}^*$  subsequently refused to repair it for that sum, and claimed to be entitled to retain the organ until he received certain remuner ation for the work done. Held, that as there is an express contract it must be performed in its entirety or nothing can be claimed under it, and there is only room for a quantum meruit claim where no express contract has been made.  $\mathcal{F}$  was not entitled to retain the organ until he was paid.—Skinner v. Fager, 6 A. 139.

# Section 171.

Element.—In order that bankers, factors, etc., have a general lien, it is necessary that the goods should be bailed to them in their respective capacities as bankers, actors, etc.

How a lien can be created.—A lien can only arise in one of three ways: (1) by common law; (2) by express or implied contract; and (3) by the general course of dealing in the trade in which the lien is claimed. I liens are of two kinds, general and particular. A general lien is the right to retain the property for general balance of accounts. A particular lien is a right to retain property for a charge on account of labour employed or expenses bestowed upon the identical property detained. Whilst particular liens are favoured, general liens are regarded with by the law, because they encreach upon the common law, and destroy the equal distribution of

the debtor's, est #e among his creditors.—In re Bombay Saw Mills Company, 100 B. 314.

Different kinds or lien in this Act.—(1) Seller's lien (s. 95); (2) Finder's lien (s. 168); (3) Liens of Bankers, factors, wharfingers, attorneys of High Court, and policy-brokers; (4) Pawnee's lien and (5) Agent's lien.

Banker.—A banker has a lien over jewels deposited in the Bank to secure certain debts.—Kunhan v. The Bank of Madras, 19 M. 234.

Factor.—A factor has a lien over property but if he wants to sell it he must prove a contract to that effect.—Fafferbhoy v. Thomas, 17 B. 520.

Attorney.—An attorney has a lien over the papers of his client for his fees. (Vide Atool v. Shoshee, 6 C. W. N. 215; Basanta v. Kusum, 4 C. W. N. 427; Maheshpur v. Jatindra, 40 Cal. 386; Mahommed v. Mahommed. 21 C. 85). But a pleader has no lien for fee (Sreemati Kamini v. Khetter Mohun, 15 C. W. N. 681; Narayan v. Chellapali, 33 M. 255).

#### Section 172.

Difference between "mortgage" and "pledge."—By a grant or conveyance of goods in mortgage, the whole legal title passes conditionally to the mortgagee. But in a pledge, a special property only, passes to the pledgee the general property remaining in the pledger. There is also another distinction. In the case of a pledge of personal property, the right of the pledgee is not consummated except by possession; and ordinarily, when that possession is relinquished, the right of the pledge, is extinguished, or waived. But in the case of a mortgage of personal property; the right of property passes by the conveyance to the pledgee, and possession is not, or may not be, essential to create or to support the title.—Fatechand's Contract Act, p. 205.

There is no reference either here or in the Transfer of Property Act to the mortgage or hypothecation of moveable property, for which, in England, provision has been made by the Bills of Sale Acts.—
Cunningham and Shephard's Contract Act.

#### Section 173.

Note.—In regard to the expenses which have been incurred by the pledgee about the pledge, we are to consider whether they are necessary and proper for its protection and preservation, or are merely useful. In the former, then the pledger is bound to reimburse them to the pledgee; in the latter, then he is not bound to reimburse them, unless locurred by his own expressed or implied authority.—Story on Bailmenes, 8, 306 A.

### Section 174.

Note.—The reason why subsequent advances made by the pawnee are supposed to be made on the security of the original pledge is thus given by Mr. Story: He who seeks equity must do equity; and the plaintiff, seeking the assistance of the Court, ought to pay all the moneys due to the creditor, as it is natural to presume that the pledgee would not have lent the new sum but upon the credit of the pledge which he had in his hands before.—Story's Equity Jurisprudence.

#### Section 175.

Example.—If for instance, a horse is pawned, and he meets with an injury by accident, the expenses of his cure seem justly chargeable upon the pawner, as they are incurred for his ultimate benefit. So if a ship, which is pledged, is injured by a storm, and expenses are necessary to preserve her from absolute foundering, such expenses seem properly to fall on the owner.—Story on Bailment, s. 537.

For ordinary expenses, see s. 173 and also s. 70.

# Section 176.

Pledgee selling to himself.—Where a pledgee, having power to sell for default, takes over, as if upon a sale to himself, the property pledged, without the authority of the pledger, but crediting its value in account with him, this act, though an unauthorized conversion, does not put an end to the contract of pledge, so as to entitle the pledger, to have the property back without payment.—Neekram v. The Bank of Bengal, 19 C. 322 (P.C.).

Limitation.—The period of limitation for recovering the money by selling the property is governed by Article 120 of the Limitation Act.—Nimehand v. Jagabandhu, 22 C. 21.

# Section 177.

Limitation.—A sult by a pawnor to redeem the pledge is governed by Art. 145 of the Limitation Act.—Yangmini Gottipati, 33 M. 56.

# Section 178.

Custody of servants.—A servant, entrusted by his mistress with the custody of goods, pawned them during her absence. The mistress sued in trover for the goods. Held that the custody of the servant was not "possession" within the meaning of s. 178 of the Contract Act, and that, if he was to be regarded as having taken the goods into his possession for the purpose of pawning them, the case came within the second proviso to that section, and that accordingly an action would lie.—Biddomoye v. Sittaram, 4 C. 497.

#### Section 180.

Note.—Under this section a bailee may recover damages, which might be for in excess of the interest of the bailee himself. S. 181 therefore deals with the apportionment of the compensation obtained by the bailee under this section.—Fatechand's Contract Act.

#### CHAPTER X.

#### AGENCY.

#### Section 182.

Agency.—The subject of "agency" is a most important branch of the Law of Contracts. It is the basis of the Law of Partnership; for partnership itself is nothing else than a grant of reciprocal agents.

The definition of an agent given in the Act is fully correct. But the following will, perhaps, give a better idea of what an agent is:—

An agent is a person who is authorized to contract legal obligations and acquire legal rights (or generally, to enter into relations, involving rights and duties) on behalf of another person from whom his authority is derived.

Chapter on agency not exhaustive.—Where no assistance can be had from the Contract Act or other enactment of the Indian Statute Book, and where no custom and usage is to be found, the Common Law of England, and the law as formerly administered in the Courts of Chancery in England may be made use of to guide as in India to the law relating to agency.—Tagore Law Lectures, 1889—90.

Varieties of agents.—Agents are divided—

- (a) In respect of the extent of their authority, into universal, general, and special agents.
  - (b) In respect of the nature of the agency; into mercantile agents.
- (c) In respect of their liability in selling, into deleredere agents and such as are not deleredere.
- (d) In respect of the amount of skill required of them, into professional and unprofessional agents.

General agents again fall into one of the two classes :-

Olass A.—Agents who pursue a definite calling as attorney, factor, broker.

Class B.—Agents permanently employed by their principals for a definite class of business, as manager or clerk.

Agent.—A person does not become an agent on behalf of another merely because he gives him advice in matters of business.

Agency is founded upon a contract either express or implied, by which one of the parties confines to the other the management of some business to be transacted in his name or on his account and by which the other assumes to do the business and to render an account of it. The essence of the matter is that the principal authorises the agent to represent or act for him in bringing the principal into contractual relation with a third person.—Mohesh v. Radha, 12 C. W. N. 28. A co-sharer who manages business or property of another co-sharer is an agent to the latter.—Chandra v. Nabin, 17 C. L. J. 133=40 C. 108.

# Section 183.

Note.—According to law prevalent in England full contractual capacity is not necessary to enable a person to represent another so as to bring him into legal relations with a third. An infant can be agent, although he could not incur liability under the contract of employment. But no one can apploint an agent who is not otherwise capable of entering into contracts. (Anson's Contract, p. 350). If you compare this section with s. Il subruthen it would be seen that the words "and is not disqualified from contracting by any law to which he is subject," which occur in that section, have been omitted here. So minority and unsoundness of mind are the only bars incapacitating a person from appointing an agent.

# Section 184.

Who may be an Agent.—As between the principal and third persons, any person may become an agent, though that person be a minor or an idiot.

# Section 185.

Consideration.—No express consideration is necessary, the acceptance of the office of agent being sufficient consideration for the appointment; and this, though it is not clearly expressed, is probably what is meant by s. 185 of the Contract Act.—Tagore Law Lectures, 1889-90, p. 3. A gratuitous agent is liable for any loss sustained by his principal through the gross negligence of the agent.—Agnew v. Indian Carrying Co., 2 Mad. H. C. 449.

# Section 186,

Express Authority.—For examples of express authority see sections of the Code of Civil Procedure Dealing with "Vakalutnamas," by which pleaders and Vakeels are authorised to act for their clients—See also Registration Act (III. of 1877), ss. 32, 33, Companies Act, Table A. ss. 48-51; Powers-of-Attorney Act (VII. of 1882).—See Tagore Law Lectures, for 1889-90, p. 18.

Implied authority.—For examples and illustrations of implied authority of particular kinds of agents, partners, bankers, kurtas of joint Hindu families, karnavans, Attorneys, masters of ships, betting agents, commission agents, auctioneers, brokers, insurance brokers, ships' brokers, part owners of ships, trustees, factors, insurance agents, pleaders, vakeels, husband and wife. Hindu wife, and agents of Government —See Tagore Law Lectures, 1889-90, pp. 136-154.

#### Section 187.

.Note.—As to agents' implied authority to borrow vide.—Ferguson v. Umchand, 33 C. 343. A husband is only liable for the wife's debt when he expressly or impliedly sanctions it otherwise not.—Girdhari v. Crawford, 9 A. 147 (F. B.). But a managing member of a Hindu family is an agent of his minor brothers.—Saroda v. Durga, 11 C. L. J. 484=37 C. 461.

#### Section 188.

Agent's power.—An agent has implied authority to pledge the credit of his principal for what is necessary to the successful management of the business as is usual. To put the matter in another way, every agent who is authorized to conduct a particular business has implied authority to do whatwever is incidental for the proper and effective performance of his duties but not to do anything outside the ordinary scope of his employment and duties.—Heramba v. Kasi, 1 C. L. J. 199 at 206.

# Section 189.

English and Indian Law Compaired.—There is no rule of law that an agent may, in a case of emergency suddenly arising, raise money, and pledge the credit of his principals for his repayment. —Per Alderson, B.: Hatotagore'v. Brown, 7 U. and W. 595. No such power exists, except in the cases alluded to in the argument, of the master of a ship, and of the acceptor of a bill of exchange for the honour of the drawer. The authority of a master of a ship rests upon the peculiar character of his office, and affords no analogy to the case of an ordinary agent.—Ibid Indian Law: The Indian law differs from the above rule of the English law. Under s. 189 of the Contract Act, masters of ships acting on an emergency and ordinary agents acting on an emergency stand exactly on the same footing.

#### Section 190.

Principle.—The general maxim of law is: "Delegata potastas nonpotest delegari." But there are exceptions to the general rule. Under the English law, an agent may delegate his authority in the following cases.—See Evans on the Law of Agency:—

(1) whenever he is expressly authorised to do so;

- (2) whenever he is allowed to do so by an enactment of .  $w \in a$  lawful custom or usage;
- (3) where the act is purely ministerial, except where personal skil or personal confidence is concerned;
- (4) whenever the object of the agency cannot properly and law-fully be attained otherwise;
- (5) where the principal is aware that his agent will appoint a sub-agent.

It may also be mentioned here that where an agent has appointed a sub-agent without authority, the principal may ratify the act of the agent with the consequences usually following ratification.—Vide also Anson's Contract.

# Section 191.

Sub-agents.—"It may be generally stated that, when agents employ the sub-agents in the business of the agency, the latter are clothed with precisely the same obligations, and are bound to do the same duties, in regard to their immediate employers, as if they were the sole and real principals."—Story on Agency, s. 386.

# Section 192.

Note.—The sub-agent referred to in this section does not include an agent or substitute appointed under s. 194. The distinction between a sub-agent and a substitute is, that between the latter and the principal there is direct privity of contract, whilst between the former and the principal there is no such privity, save in cases of fraud and wilful wrong done by the sub-agent.—See Tagore Law Lectures, 1889-90, p. 37.

There are only three grounds, on which a principal has been held entitled to sue a sub-agent employed by his agent. The first is title, whereby he may follow his property in the hands of the sub-agent if he finds it there. The second ground is privity of contract. The only remaining ground on which a sub-agent could be made liable to account to principal goods sold through the sub-agent is fraud, or something equivalent to fraud. The law applicable to India upon this point is now embodied in \$. 192 of the Contract Act.—Peacock v. Baijnath, 18 C. 573=18 I. A. 78.

# Section 193.

Note.—Where an agent, "properly appointed," this section has no application, s. 192 will be applicable in that case.

# Section 196.

Principle.—The maxim of law is "omnis rati liabitio retrotranitur et mandato priori acquiparalur." (Every consent given to what has been already done has a retrospective effect, and is equivalent to a previous request.)

Essentials of ratification.—(1) The act to be ratified must be voidable and not void. (2) It must be performed by one professing to act for another. (3) The person in whose behalf the act is done must be in existence at the time of its performance except in cases governed by rules of equity. (4) The person who undertakes to ratify must do so with a knowledge of all material circumstances, or with an intent to take all liability without such knowledge. (5) He must also be capable of ratifying the act. (6) When formalities are necessary they must be observed —Evans on Law of Agency; see also Anson's Contract. Ratification must be done to acts done on behalf of the ratifier.—Bejoy v. Girindra, 8 C. L. J. 458.

#### Section 197.

Conduct of the person on whose behalf the acts are done.—Collateral circumstances, long acquiescence, without objection and small matters may amount to a conclusive presumption of ratification.—See Prince v. Clarke, 1 B. & C. 186. See also Moeradie v. Syeffollah, W. R. (1864) 318, where a man who allowed his wife to have control over certain property and to mortgage it, was held bound by the mortgage.

# Section 198.

Note .- Vide Heramba v. Kasi, 1 C. L. J. 199.

# Section 199.

Note.—The general rule of law is that a principal cannot ratify a part of the unauthorized act by an agent. Where ratification is established as to a post, it operates as a confirmation of the whole of that particular transaction of the agent.—Story on Agency, s. 280; Vithal v. The Secretary of State for India, 26 B. 410.

# Section 201.

Note,—Nothing is said as to termination by efflux of time when a period is fixed for performing the business, or as to the agents' insolvency, which at all events determines his authority to receive money on behalf of his principal.—Anglo-Indian Cade, Vol. I., p. 34.

Agency also terminates (1) when the subject-matter of the agency has ceased to exist, (2) when the principal's power over the subject-matter has come to an end.

# Section 202.

Principle.—"The principal's right to revoke is affected by the interests (1) of third parties, (2) of the agent. If the employment is

in its nature such that the authority cannot be revoked without loss to the agent, the principal may not revoke. This rule has recently been treated as identical with a rule of a more limited significance, that "an authority coupled with an interest is irrevocable."

Authorities given to an agent to pay to a third party a debt which he owes to his principal, or to sell I nds and pay himself a debt due to him out of the proceeds, are instances in which an authority has been held to be irrevocable by reason of interest. "The result appears to be," said Wilde, C. J., in Smart v. Sandars, "that where an agreement is entered into on sufficient consideration, whereby an authority is given for the purpose of conferring some benefit on the donee of that authority, such an authority is irrevocable. That is what is usually meant by an authority coupled with an interest."—Anson's Cantract, p. 385.

# Section 205.

Period of agency implied.—Where no time is mentioned for doing a particular act, the period of time depends upon the particular circumstances of each case.—Fordon v. Ram, 8 C. W. N. 831.

Revocation.—The principal is bound to make compensation to the agent, whenever there is an express or implied contract that the agency shall be continued for any period of time. This would probably always be the case, when a valuable consideration had been given by the agent.—Vishnu v. Ram, 5 B. 253.

# Section 206.

Note.—In the case of gratuitous agencies, the complaining party will have to show that he suffered some actual damage; but in the case of paid agencies it must be presumed, it is submitted, that some sort of damage was sustained. The question as to whether a notice given in a particular case is reasonable depends upon the circumstances of each case.

# Section 211.

Note.—This and the few following sections deal with the duties and liabilities of agents. One of the several ordinary duties of agents is that they should obey their masters' instructions. The leading case on this point is *Fray* v. *Vowles*, 28 L. J. Q. B., 232.

# Section 213.

Duty of agent to account.—It is the duty of an agent to render proper accounts to his employer irrespective of any contract to that effect. And he does not discharge that duty by merely delivering to his employer a set of written accounts without attending to explain them, and produce the vouchers by which the items of dis-

bursements are supported.—Per Field, J.: Annoda Pershad Roy v. Dwarkanath Gangopadhya, I. L. R., 6 Cal. 754.

In order to enable an agent to prepare accounts to be furnished to his principal, he should be allowed to have reasonable access, at proper times and in the presence of responsible persons, to such books and papers in the principal's possession as may be necessary for the preparation of the accounts.—Ibid.

#### Section 215.

Note.—The section does not go to the length the English law does in granting telief to the principal in the cases covered by the above section. Under the present section, it seems, the principal is not allowed to "repudiate the transaction" if he cannot show, either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him. The above wholesome rule of the English law does not seem to be provided for either by this or the following section.

#### Section 216.

Scope.—Section 216 of the Indian Contract Act is merely enabling and confers upon the principal the right to claim from his agent the benefit of the transaction to which the agency business related, where the agent, without the knowledge of the principal, has dealt with the business on his own account, instead of on account of the latter. The principal is free to exercise that right or not. The law is that where a party elects to adopt a transaction, he must take its benefit with its burden. He cannot, as is said, "both approbate and reprobate." But both the benefit and burden must, for the purpose, be attached to an incident of the transaction which the principal has affirmed.—N. Foachinson v. Meghu, 34 B. 292. See also 26 B. 689; 40 C. 335.

# Section 217.

Note.—This section must be read with s. 221. See ss. 170 and 171, which give exactly similar rights to bailees. Although under s. 171 a pleader has no lien for his fee (Kamini v. Khetter, 15 C. W. N. 681) yet under this section a pleader is entitled to recover the out-fees advanced by him by retaining the same out of the sums received by him to the credit of his client.—Subba v. Ramasami, 27 M. 512.

# Section 218.

Note.—S. 218 of this statute provides that an agent is bound to pay to his principal all sums received on his account, clearly then the business does not terminate on receipt of the money by the agent, inasmuch as there is a subsequent obligation to account for the

sums and to pay them.—Babu Ram v. Ram Dyal, 12 A. 541. An Agent is liable to the principal even for money received by him on an illegal contract.—Bhola v. Mul Chand, 25 A. 639.

#### Section 219.

Remuneration on completion.—A clerk who is engaged on a monthly salary is not entitled to his pay when he abruptly leaves service during the middle of the month without the cousent of his master. (Ralli Brothers v. Ambica, 35 A. 132). On the same principle an agent is not entitled to any remuneration until the completion of the act. But when the agents' part of the work is complete and the transaction falls through on account of some latches on the part of the principal in that case the agent is entitled to his remuneration.—Gobind v. J. Elices, 30 C. 202; Municipal Corporation of Bombay v. Cuverji, 20 B. 124. In cases of part performance also an agent is entitled to be remunerated, where the bargain is merely that the bankers should introduce the purchaser and effect an agreement between him and the suitor.—W. B. Stokes v. Soonder Nath, 22 B. 540.

#### Section 220.

Note — The breach of any of the duties mentioned in ss. 211 to 216 would, it is submitted, be understood as "misconduct" within the meaning of the above section. An agent who is guilty of misconduct may also be removed from agency.—Vide Kunchunnia v. Subramanian, 33 M. 162.

# Section 221.

Note.—See s. 217 and the latter part of s. 219. This section like s. 170, gives a special lien only. But see s. 171. For full information upon the subject.—See Tagore Law Lectures, 1889-90, 218-241.

# Section 222.

Note.—The principal must pay the agent such commission, or reward for the employment, as may be agreed upon between them. He must also indemnify the agent for acts lawfully done and liabilities incurred in the execution of his authority.—Anson on Contract. But where an agent makes a voluntary or officious payment, though for the benefit of the principal, he will not be entitled to be indemnified therefor.—Tagore Law Lectures, 1889-90, p. 266. Where, however, there is a special contract, which is in itself ultra vires, if the principal adopts the contract he must ind mnify the agent against its burden.—See Tagore Law L ctures, 1889-90, p. 267, and the authorities cited therein.

#### Section 224.

Note.—In the case of immoral or illegal act, an agent can violate the instructions of principal with impunity because in such a case if he foolishly follows the instruction of the principal he alone would be liable for the act and the principal is in no way responsible for it.

#### Section 225.

Note.—The English Common Law rule, as it stood before the Employer's Liability Act of 1880, is that a master is not liable to his servant for injury received from any ordinary risk of or incident to the service, including acts or defaults of any other person employed in the same service.—The Law of Torts by Sir Frederick Polloch.

#### Section 226.

Scope.—A master or principal is liable for wrong done to third parties by his servant or agent, provided the act is done on his behalf and with the intention of serving his purposes.—Ishwor Chunder v. Satish, 30 C. 207. But it is settled law that "where the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment."—Shiva Bhajan v. Secretary of State for India, 28 B. 314.

#### Section 227.

Right of third party.—The right of a third party against the principal on the contract of his agent, though made in excess of the agents' authority, was nevertheless enforced where the evidence showed that the contracting party had been led into an honest belief in the existence of the authority to the extent apparent to him.—Ram Pertap v. G. Marshall, 26 C. 701 (P. C.).

#### Section 228.

When principal is bound.—A principal is bound when he has, by his words or conduct, induced a third person to believe that the agent's acts were within the scope of his authority.—Premabhai v. J. H. Brown, 10 B. H. C. R. 319.

#### Section 229.

Principal.—The rule of law that notice to the agent is no tice to the principal has been embodied in s. 229 of the Contract Act and s. 3 of the Transfer of Property Act. It is not a mere question of constructive notice or inference of fact but a rule of law which imputes the knowledge of the agent to the principal, or (in other words) the agency extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings.—Rampal Sing v. Balbhaddars, 25 A. 1.

#### Section 230.

- (1) Contracts made for a principal resident abroad. Where a contract is made by an agent for the purchase of goods for a merchant resident abroad, the agent can personally enforce such contracts, and, of course he is personally liable for them. But the question left undetermined by the Act is can the principal himself in such cases sue or be sued. To answer this question we must therefore refer to the rule of English law. According to Thompson v. Davenport, 2 Sm. L. C. 286, it appears that the agent alone is liable. in Green v. Kopke, 18 C. B. 549. Jervis, C J. qualifies the above rule, and remarks that it is a question of intention to be gathered from the contract itself and the surrounding circumstances. The fact of the principal residing abroad is entitled to some weight, but there is no rule of law that an agent is in all cases liable personally where the principal is a foreigner residing abroad. Parke, B. in Held v. Kenworthy, 10 Ex. 739, observes that, in such a case, the presumption is that the seller did not contract with the foreigner, but with the agent a lone.
- (2) Undisclosed principal.—The phrase "undisclosed principal" has two meanings. One is that a principal is known to exist, but whose name only is not disclosed. The other is, that the very existence of the principal is not known to the other party. In either of these cases the agent must contract in his own name, and the general rule of law in such cases is, that the principal or the agent may sue or be sued.—Peter v. Gordon, 7 M. H. C. 82. But there are exceptions:—

Exception 1.—This rule does not apply to contracts under seal.

Exception 2.—The above rule does not apply to bills of exchange, etc.

(3) Where the principal, though disclosed, cannot be sued.—See ss. 11 and 183.

Presumption.—The presumption created by s. 230 is merely a prima facie one, and may be rebutted.—Gubboy v. Avetoom, 17 C. 449.

# Section 231.

Note.—The last portion of the first paragraph of this section lays down exactly the same rule of law as is done by s. 232.

The second clause of paragraph 1, of s. 231 gives a party contrating with an agent the same rights against the principal as he would have had against the agent; and s. 234 adds a further qualification to his rights as against the principal.—Premji v. Madhowji, 4 B. 447.

S. 231 of the Indian Contract Act deals with the rights (a) of the principal and (b) of the third party in cases where the contract is entered into by the agent without disclosing his principal. The first

clause refers to the general cases where the rule is that the third party shall have as against the undisclosed principal the same rights which he would have had as against the agent if the agent had been the principal. The second clause deals with the particular case where the principal discloses himself before the contract is completed. The socond clause should be read as governed by the preceding clause. The words "discloses himself" in s. 231 of the Indian Contract Act must be considered strictly.—Lakshman v. Anna, 6 Bom. L. R. 731—32 B. 356.

#### Section 232.

Note —S. 222 is to be read as a qualification of the first portion of paragraph 1 of s. 231, which gives a principal a general right to enforce a contract entered into by his agent. S. 232 qualifies that general right by making it subject to the rights and obligations subsiting between the agent and the other contracting party.—Premji Tukan Dass v. Madhowji, 4 B. 447.

#### Section 233.

Note.—Under the circumstances mentioned in this section, both the principal and the agent may be made liable, i. e., both of them may be sued. It must, however, be remembered that their liability is several, and not joint.—See Story on Agency, s. 260. Where the lender does not look exhaustively to the agent for payment, in that case it can proceed against the principal.—Satya v. Gobind, 14 C. W. N. 414.

# Section 234.

Principle.—"A person who has both principal and agent liable to him upon the contract may lose his remedy against either of them by inducing him to believe and to act upon the belief, that he is going to hold the other only liable. He has a right of election, but when he has once elected finally, there is an end of the matter, and he cannot make a fresh election "—Cunningham's Contract Act.

#### Section 235.

Scope.—S. 235 of the Indian Contract Act applies not only to the case of a person who represents himself to be the agent of another when in fact he has no authority from him whatever, but also to the case of a person who untruly represents the extent of the authority given to him.—Ganapat v. Sarju, 34 A. 168.

# Section 286.

Note,—S. 236 appears to be wide enough to cover cases both where the supposed principal is named, and where he is not named.—

Tagore Law Lectures, 1889-90, p. 339. See also Sewdutt v. Nahapiet

34 C. 628 and Ramji v. Fanki, 39 C. 802, which cover two kinds of case mentioned above.

# Section 237.

Note.—It is undoubted that a person who deals with an agent, whose authority he knows to be limited does so at his peril, in the sense, what should the agent be found to have exceeded his authority his principal cannot be made responsible.—Russo-Chinese Bank v. Li Yan San, 14 C. W. N. 381, P. C. This makes no distinction between the case of a general and that of a special agent.—Anglo-Indian Code, Vol. I., p. 646.

#### Section 238.

Fraud of agent.—A master is answerable for every such wrong of his servant or agent as is committed in the course of the service, and for the master's benefit, though no express command or privity of the master be proved; and there is no distinction between the case of fraud, and the case of any other wrong.—Mackay v. Commercial Bank of New Burnswick, L. R. 5 P. C., 394; See also D. Me Laren Morrison v. S. Verschoye, 6 C. W. N. 429; Lloyed v. Grace Smith, (1912) A. C. 716.

# CHAPTER XI.

# Section 239.

Elements of partnership.—The right to control the property, the right to receive profits, and the liability to share in losses are the elements of partnership. These are merely indicia which may help a Judge in finding whether a partnership as defined in the Indian Contract Act, exists.—Vadial v. Shah Khushal, 27 B. 257.

# Section 242.

Note.—See the case of D. McLaren v. S. Verschoyle, 6 C. W. N. 29 for ellucidation of this section.

# Section 245.

Note.—Where a person, though not in fact a partner, did by his acts and conduct, hold himself our to strangers as such or allows others to do it, he is estopped from denying the character he has assumed. A man so acting may be rightly held as a partner by estoppel.—Mollow v. Court of Wards, 18 W. R. 384 P. C.; Colonel A. R. Porter v. W. Incell, 10 C. W. N. 313.

#### Section 246.

Note.—S. 245 provides for active holding out and this section provides for passive holding out but the principle is the same.

#### Section 247.

Note.—The first portion of this section is in accordance with English law. The latter portion, "but the share of such minor in the property of the firm is liable for the obligations of the firm," seems to go beyond the rule of English law.

Under the English law, if he avoids the contract; and has derived no benefit f om it he is entitled to recover back any money paid by him in part performance of it.—Lindley on Partnership.

Under the Indian law, his share in the property of the firm is liable for the obligations of the firm, whether he has derived any benefit or not.

# Section 248.

Under the English law, if a minor, after he has attained majority does not expressly either affirm or disaffim the partners ip, he will be liable for debts incurred by his co-partners subsequently to that time.—See Lindley on Partnership, p 76.

The Indian law, under the above circumstances, will make him liable for all obliquations incurred by the partnership since he was admitted to the benefits of the partnership.

The minor's repudiation of the partnership must be taken subject to the provision of s. 64.

# Section 249.

Every partner stands in the relation of principal and agent to each other. Each partner may be regarded as an agent of the firm or the persons composing the firm:

The section is in accordance with English law. As the firm is not liable for what is done by its members before the partnership between them commences, so upon the very same principle a person who is admitted as a partner into an existing firm does not by his entry become liable to the creditors of the firm for any thing done before he became a partner.—Lindley on Partnership.

S. 249 has no application in cases, where, by arrangement between the parties, a person is entitled to the profits of, and liable for the debts accruing to and incurred by, the firm before his admission as a partner.—Shiwak v. St. Foseph, 9 C. L. R. 21.

#### Section 250.

Scope.—A firm can only be made liable for what is done by one of its members on the supposition that the act in question was authorised by the other members. Now, as by law they are held prima facie to authorise all acts necessary for carrying on the business of the firm in the usual way, they cannot escape liability for any act of this character unless they can show that the apparent authority to do it did not exist, and was known not to exist. But when it is sought to make the firm liable for some act not prima facie authorised by it, an actual authority by it must be shown; and if this cannot be done, no case is made out against the firm however ignorant the person seeking to charge it may have been of what was authorised and what was not.—Lindley on Partnership, p. 168.

# Section 251.

Note.—The law, which regulates the liability of partners for the acts of their co-partners is a branch of the law of agency; and in the absence of any specific rice upon the subject under the law of partnership, we must look to the law of agency for the solution of our present question. Each partner is the agent of his co-partner for the purpose of contracting debts and obligations in the usual course of partnership business; and when this agency has once been established, it does not cease as regards third persons, until its termination has become known to them.—Chundee v. Eduljee, 11 C. L. R. 225 (229).

#### Section 253.

Clause 1.—The phrase "joint owners" must be understood as joint owners without the benefit or risk of the doctrine of survivorship.

Clause ... The word equally must, it is submitted, mean in proportion to his contribution.

Clause 3 —As a rule, there is some express contract to the contrary on this point.

Clause 4.—The second branch of it does not prevent a partner from recovering compensation for the extra trouble thrown on him by a co-partner who has disregarded the first branch by wilful inattention to business.—An glo Indian Codes, Vol. 1, p. 651.

Clause 5.—As a rule if the partners are equally divided those who forbid a change must have their way.—Lindley on partnership.

Clause 6.—The effect of cl. 6 of s. 253 of the Contract Act is not to render an assignment of a share in a partnership concern illegal or void as between the parties to the assignment, but only so far void as between those parties and the other partners as to cause an immediate dissolution of the partnership.—Juggut Chunder v, Radha, to C. 669, One partner cannot, by assignment of his share, make any

one else a partner in his stead with his co-partners; and therefore upon his assigning his share the partnership ceases to exist, unless the other partners consent to accept the purchaser as a partner in the place of the latter.—Ibid 672.

Clause 8.—The retiring partner must of course give notice to the other partners.

Clause 9.—He may also retire if any express agreement or contract gives him the power to retire.

Clause 10.—The executors of the deceased partner have no right to interfere with the partnership business, "but they" represent him for all purposes of account, and, unless restricted by special agreement, they have the power, by bringing an action to have the affairs of partnership yound up in a manner which is generally ruinous to the order partners.—Lintley on Partnership.

#### Section 254.

Clause 1.—Under the English law "the Court must be satisfied by clear evidence that the insanity exists and is incurable; a temporary illness is not sufficient.—Lindley on Partnership, p. 578.

Clause 2.—If a trader assigns all his property except on some substantial contemporaneous payment, or substantial undertaking to make a subsequent payment, that is an act of insolvency, and is void against the creditors on his insolvency, simply because nothing is left wherewith to carry on the business, whereas, if he receives such assistance, something is left to carry on the business.—Khoo Ewat v. Wovi Taik, 19 C. 223 (P.C.)

Clause 3.—This clause seems to a great extent to cover clause.

2. It also seems to modify cl. 7 of s. 253.

Clause 4.—The word "incapable" is perhaps intended to mean "permanently incapable," and not simply temporarily incapable.

Clause 5.—Non-compliance with the requirements of ss. 257 and 258 may, it is submitted come within the meaning of "gross misconduct," in s. 365. Adultery of one partner with the wife of his co-parter is a sufficient ground for dissolution of the partnership,—Abbot v. Cump, 5 Bom. H. C. 109,

Clause 6.—A Contract between a partner and his co-partners for remuneration to the former for the management of partnership business by a commission on the sale, during his lifetime, does not in the absence of any express agreement to that effect, imply a renunciation of the right of a co-partner to dissolve the partnership if they find that it cannot be carried except at a loss; nor does it imply an obligation to pay the managing partner compensation in case the

partnership is dissolved for that reason.—Cowasjee v. Lallbhoy, 1 A.

# Section 255.

Note.—A partnership is also dissolved by a public war between the countries of which the partners are respectively subjects.—Story on Partnership, s. 315.

In such cases the whole partnership property is liable to capture and condemnation as enemies' property, notwithstanding one or more of the partners may be domiciled in the neutral country.—Ibid s. 316.

# Section 257.

Note,—It is a principle of the Court with regard to partnership concerns that a partner, who complains that the other partners do not do their duty towards him, must be ready at all times, and offer himself to do his duty towards them.—Coust v. Harris, I T. L. R. 524.

#### Section 263.

Note.—After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership and to complete trensactions begun, but unfinished, at the time of the dissolution, but not otherwise.—S. 38 of the English Partnership Act. See also Hazi Mahomed v. Dwarka Nath, 11 C. L. J. 658; Administrator General v. Official Assignee, 32 M. 462.

# Section 264.

S. 264 of the Contract Act is not intended to be an exhaustive exposition on the question of notice of a dissolution of partnership.—Chundee v. Eduljee, I. L. R. 8 Cal. 678. It is difficult to understand precisely what the section actually means. According to this section persons dealing with a firm will be affected by a dissolution if a public notice has been given. In such a case, the Act seems to dispense with special notice, which in justice and equity, old customers of the firm ought to be entitled to have. But in Chundee Churn Dutt v. Eduljee Cowasjee, I. L. R. 8 Cal. 678 the learned Judges held that the mode of notification of dissolution required in the case of old customers, who are known to the firm as having dealt with it, is an express or specific notice by circular or otherwise, but, in the case of general public, the most effectual public notice which can reasonably be given is requisite.—See Shewcram v. Rahomutoollah, W. R. (1864) 94.

# Section 265.

Note.—Where a partner is entitled to claim a dissolution of partnership, or where a partnership has terminated, the Court may, in the absence of any contract to the contrary, wind up the business of the partnership, provide for the payment of its debts, and distribute the surplus according to the shares of the partners respectively.

END.

# NOTES ON

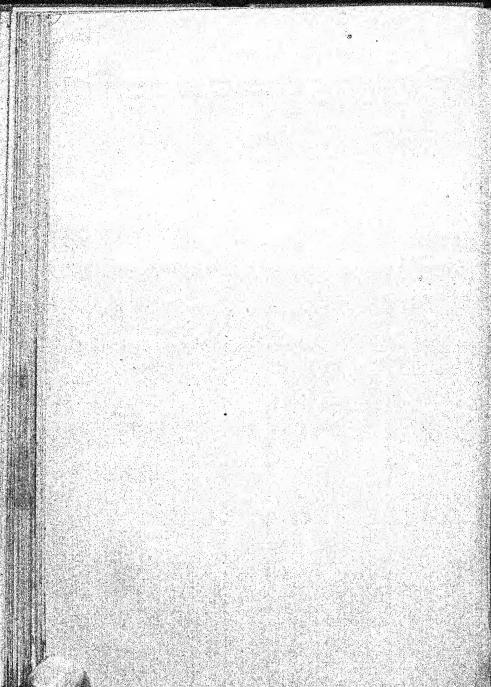
# INDIAN REGISTRATION ACT.

#### Section 17.

Scope.—The registration of a document can only be said to be compulsory when it is brought under s. 17 of the Indian Registration Act by a Specific Act of the Legislature.—Holmwood's Registration Act, p. 155.

- (a) Deed of gift.—A hibabiawas although made on the nominal consideration of "a than of cloth and natural love and affection" is merely a deed of gift and as such must be registered.—Golam v. Goberdhone, 8 C. L. R. 441.
- (b) One hundred rupees.—For the purpose of the Registration Act, the value of an interest that is conveyed is the consideration mentioned in the sale-deed by the parties thereto.—Vasudev v. Rama, 11 B. H. C. R. 148; Rohinee v. Shib, 15 W. R. 558. Even in cases of mortgage the value is estimated by the amount of the principal money without any reference to the duration of the relation of mortgagor and mortgagee; or to the rate of the continuance of the interest payable.—Nana v. Anant, 2 B. 353; Panchi v. Ahmedulla, 12 C. L. R. 444. The words "or in future" have reference to the estates in remainder or reversion in immoveable property, or to estates otherwise deferred in enjoyment, and not to interest payable in future or principal moneys lent on the security of immoveable property (2 B. 353; I M. 378). This view has also been adopted by a Full Bench of the Allahabad High Court.—Vide Habibulla v. Nakched, 5 A. 447 (F.B.).
- (c) Scope.—The strictest construction should be placed on the prohibitory and penal sections of the Registration Act, which imposes serious disqualifications for non-observance of registration.

An instrument to come within s. 17 (b) of the Registration Act must in itself purpose or operate to create, declare, assign, limit or extinguish some right, title, or interest of the value of Rs. 100 or upwards in immoveable property. To come within s. 17 (c), it must be on the face of it an acknowledgment of the receipt or payment of some consideration on account of the creation, declaration, assignment, limita-



# NOTES ON

# INDIAN SUCCESSION ACT.

# PART I.

Scope of the Act.—The Indian Succession Act was passed in 1865, but it did not apply to Hindus. By s. 2 it is declared to constitute the law applicable to all cases of testamentary succession, but by s. 331 the provisions of the Act are declared not to apply to testamentary succession to the property of any Hindu, Mahomedan or Buddhist.—Tagore Law Lecture, 1887, p. 10; See also Mirza Kurratulain v. Nawab Nusat-ud-dowla, 33 C. 116 (P. C.).

# Section 2.

Scope.—Since the passing of the Indian Succession Act 1865, the Court must look to that Act and that alone, for the law of British India applicable to all cases of testamentary and intestate person who are governed by this Act. The words "applicable to all cases," operate as a repeal of the pre-existing law subject to the exception in the section.—De Souza v. The Secretary of State, 12 B. L. R. 423.

# Section 3.

Minor.—The definition of minor or minority is only applicable to cases of intestate or testamentary succession.—Sultan v. Smith, 12 B. L. R. 358.

# PART II.

# Section 5.

Domicil.—Is "a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." There can be no doubt that this is the kind of residence which is essential to domicil, but the conception itself may be, perhaps more accorately explained as the relation of an individual to a particular state which arises from his residence within its limits as a member of its community.—Foote's Private International Jurisprudence, p. 52.

Immoveable property.—The jurisdiction over real or immoveable property, abstracted from the acts and contracts of the persons who deal with it belongs to the forum situs alone, which will administer the lex situs in exercising it.—Foote's Private International Furisprudence, p. 200.

Moveable property.—Moveables follow the person of the owner, and accordingly the law of his domicil governs all transmissions and distributions of moveables which arise from an alteration of his personal status.—Foote's Private International Jurisprudence, p. 250.

### Section 7.

Domicil of origin.—The domicil which attaches to a man at the moment of his birth, generally spoken of as the domicil of origin, is in ordinary cases that of, his father; though where a child is posthumous or illegitimate the domicil of its mother is necessarily taken to decide its own.—Ibid, p. 53.

Note.—Cases can of course be suggested where the domicil must be decided by the place of a child found exposed, whose parents are unknown.

# Section 9.

Note.—The domicil of origin adheres until a new domicil is acquired.—Bell v. Kennedy, L. R. r H. L. S. C. 307.

# Section 10.

New domicil.—The domicil of origin adheres until a new domicil is acquired, and in the case of an adult this change is effected by a de fucto removal to a new place of residence, together with an animus manendi. As to the factum of removal, it is apparently now settled that a new domicil is not acquired until the transit is complete, and that when a domicil of choice is abandoned; the domicil of origin revives until a new one is completely fixed —Foote's Private International Law, p. 54.

# Section 11.

Principle.—The domicil of origin is changed, by a de facto removal to a home in a new country, with an animus non revertendi and an animus manendi. But in England the animus manendi or non severtendi is a question of fact for the Court and which can be determined with difficulty. To obviate this difficulty the Indian Legislators presume animus manendi from his declaration in writing and his animus non revertendi from one year's residence.

# Section 12.

Note.—With regard to the domicil of the Consuls, mere residence as a consular officer in a foreign country gives rise to no inference of domicil in that country; but a person already domiciled in a country does not destroy or abandon such domicil by becoming a consul in it for a foreign State. Story (Conflict of Law 813) says that which they represent; and to which they domicil in the country applies a fortiori to ambassadors.—Foote's International Law, pp. 62, 181.

#### Section 14.

In ordinary cases, the domicil of origin is that of one of the parents, and during legal infancy it changes with that from which it is derived. Mr. Westlake points out that a married minor must be regarded as sui juris for the purposes of domicil, since on his or her marriage a new home founded. In such a case the question would appear to be one of fact, and if a minor, after the ceremony of marriage, continued to reside with his or her parents, there would be no occasion to consider it, inasmuch as there would be only one locality to which the domicil could possibly be attributed. — Ibid, p. 53.

# Sections 15,|16.

Note.—A woman when she marries a man, not only by construction of law, but absolutely as a matter of fact, does acquire the domicil of her husband if she lives with him in the country of the domicil. The petitioner had the intention of taking up her permanent abode with him, and of making his country her permanent home. But a married woman is rendered capable of acquiring a new domicil distinct from her husband's by a judicial separation.—Ibid, p. 60.

# Sections 21, 22.

Note —The Hindu mode of computation of degrees is the same as that adopted by the canonists and is different from the English or Civilian mode which is adopted in the Succession Act, ss. 21 and 22, and according to which you are to exclude the propositus, and count as one degree each ancestor and each descendant lineal and collateral, down to the relation whose degrees of distance from the propositus you are computing. According to the Hindu or Canonist mode which is also called the classificatory mode, you are to count the propositus as one degree, and then count his as many ancestors as will make up the given number, taking each ancestor as one degree, and then count as many descendants of the propositus or that ancestor feach of the said ancestors, as together with the propositus or that ancestor respectively, will make up the given number.—Sarkar's Hindu Law.

#### Section 23.

Note.—The Hindu lawyers make a distinction between agnates and cognates.

#### Section 44.

Scope.—A person with an English domicil marrying a wife with an Indian domicil is on her death entitled to inherit the whole of her moveable property to the exclusion of the next of kin. Ss. 4 and 44 of the Succession Act do not affect the law of succession, but relate to the immediate effect of marriage on moveable property belonging to either of the married persons and not comprised in an antenuptial settlement.—P. G. Hill v. Administrator-General of Bengal, 23 C. 506.

# PART VII.

#### Section 46.

Testamentary capacity.—The only test as to whether a person has testamentary capacity or not is whether he does or does not know what he is doing. So testamentary capacity does not depend upon sound body but upon reasonably sound mind. A person's testamentary capacity is to be considered with reference to the particular will in question. If it is held that a particular testator had capacity to make the particular will but not a more complex one, then it is the duty of the Court also to hold that the particular testator had testamentary capacity to make that will.—See Sajid Ali v. Ibad Ali, 23 C. 1—22 I. A. 171.

# Section 47.

Scope.—This section is not applicable to Hindu wills, so a Hindu father has no statutory power to appoint a guardian to his son after his death.—Budhilal v. Morarji, 31 B. 413.

# Section 48.

The onus lies upon the person propounding the will and not upon the person who impeaches it.—Sukh Die v. Keder, 5 C. W. N. 895=33 A. 4.

# Section 49.

Revocation.—A will takes effect after the death of the testator.

Hence a will can be revoked before the death of the testator.—Sita Keer v. Deb Nath, 8 C. W. N. 614.

### Section 50.

Execution.—The word execution when applied to a document means the last act or series of acts which completes it. It might be defined as a formal completion.—Bhawanji v. Devji, 19 B. 635.

Unprivileged will.—Wills which are not privileged are called unprivileged wills. As to the definition of privileged will vide s. 52 of the Succession Act.

Clause (1).—An unprivileged will must be in writing and then on that document the testator shall sign. But word sign does not include signing one's own name. Neither pen or ink is necessary for signature. Where a testator was in the habit of using a name stamp, his servant may put in his name stamp in the will at his direction and the signing would be complete.—Nirmal v. Sarat, 25 C. 911.

Mark.—The signature or mark of the testator must be that of a conscious person, and not the result of mere mechanical movement of the hand (Kalu v. Nabin, 21 W. R. 84). Mark is usually the sign of a cross. A mark is usually made by pen or some other instrument.

Some other person.—The person making the signature of a will for the testator, is not competent as an attesting witness of its execution under the provision of this section (Avabai v. Pestanji, 11. B. H. C. R. 87). So in a later case it was held that where the testator does not himself sign the will, but some other person signs it in his presence and by his direction then, besides this other person, there must be two witnesses who must sign the will in the presence of the testator.—In re Hemlota Debi, 9 C. 220. But see 1 C. 150.

By his direction.—As to what is vide Krishna Char v. Vadachi, 6 M. L. J. 209.

Glause (2).—The registration of a will by a testator and his signature to the certificate of admission of execution testified by signatures of Sub-Registrar and of a witness is sufficient under s. 50.—Amarendra v. Kasi, 27 C. 169.

Clause (3).—The testator must first sign the will or put his mark thereon or some one must sign for the testator at his direction etc., and then the attesting witnesses must sign their names after the testator shall have executed the will. (In re Hurro Sundery, 6 C. 17.) It is necessary that the attesting witnesses must either see the testator to sign the will or affix his mark or must have a personal acknowledgment from him that the signature or mark is that of the testator. It is also necessary that the attesting witnesses must sign in the presence of the testator but it is not necessary that they must sign in each other's presence.

## Section 51.

Doctrine of incorporation.—"A will is not necessarily contained in the testamentary document which is executed and attested, but may constitute as a part of itself other papers by mere reference. Hence the rule is that, if the testator in a duly executed will or codicil refers to any other instrument or paper, attested or not, the instrument or paper so referred to becomes incorporated in and forms part of the will."—Mozumdar's Hindu Wills Act, p. 144.

Requirements.—(1) The documents must be in existence at the time of the execution of will. (2) The identity of the paper must be proved.—See Musumdar's Hindu Wills Act, pp. 145—147.

## PART X.

#### Section 54.

Bequest to attesting witness.—A bequest made to an attesting witness or to his wife is void under this section.—The Administrator General v. Lazar Stephen, 4 M. 244.

#### Section 55.

Note.—The Law is the same as that of England. Vide Stat. r. Vic., C. 26, ss. 16 and 17.

#### Section 56.

In the case of a Jew it was held that a will executed by him after his first marriage and before his second marriage and during the lifetime of his first wife should be revoked by the second marriage.—

Gabriel v. Mordakei, 1 C. 148.

## Section 57.

Actual destruction.—Actual destruction or formal revocation in writing is not essential in cases of Hindu Will.—Venkayyamma v. Venkata, 25 M, 679.

## Section 58.

Where alteration are duly attested probate or letters of administration can be given otherwise not.—Raghubar v. Ram, i C. W. N. 428; Paramma v. Ramchandra, 7 M. 302.

## PART XI.

## Section 61.

Intention of the testator.—"The question in expounding a will is, not what the testator meant, but what is the meaning of his

words. The use of the expression that the intention of the testator is to be the guide, unaccompanied with the constant explanation that it is to be sought in his words, and a rigorous attention to them, is apt to lead the mind, insensibly, to speculate upon what the testator may be supposed to have intended to do instead of strictly attending to the true question, which is that which he has written means." -Abbott v. Middleton, 7 H. L. 68. So also in the case of Soorjo Money Dossee v. Denobundoo Mullick, 6 M. I. A. 526, the principle has been laid down thus :- "Primarily the words of a will are to be considered. The convey the intention of the testator's wishes, but the meaning to be attached to them may be affected by surrounding circumstances, among which is the law of the country in which the will is made and its dispositions are carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions he has made, had regard to that meaning or to that effect, unless the language of the will, or the surrounding circumstances, displace that assumption. See also, o M. I. A. 123: 18 W. R. 39; 11 C. L. J. 461.

Technical words, etc.—It is not at all necessary that any technical or artificial forms of words should be used in a will. But if words of art are used, they are to be construed according to the technical sense, unless upon the whole will it is plain, that the testator did not so intend. So also where technical words have been used, the Court has no right or power to say that the testator did not understand the meaning of the words used, or to put a construction upon them different from that which has been long received or what is affixed to them by law. But if the testator import in the sense which the law has imposed upon them, that intention must prevail notwithstanding he has used such technical words in other parts of the will.—Henderson's Succession Act. See also Din Tarini v. Krishna, 13 C. W. N. 291.

Rules of Constrution.—The general rules of construction may be summarised thus:—(1) It presumes that ordinary technical or foreign words are used in their usual meaning. (2) Where a word is used in a clear and definite meaning in one part of a will or deed, then the presumption is that it means the same thing where, when used in another part, its meaning is not clear. (3) To ascertain the usual meaning of a word, the Court may, where it is an ordinary word, consult a dictionary; and where it is a trehnical or foreign word, hear expert evidence, unless the word is a technical term of English Law. (4) Words in a will or deed will be held to be used in a sense different from their usual meaning under the following circumstances:—(2) when they have no reasonable application to the condition of things with reference to which the will or deed was made, unless read in a different sense, provided such sense is one which they can reasonable application to the condition of

ably bear. (c) When being used in a relation to a place of trade they have a customary sense different from their ordinary meaning, unless there is something in the context or in the condition of things with reference to which the will or deed was made to exclude the customary sense. (d) When, being names or descriptive words, they properly describe no object in the condition or things with reference to which the will or deed was made, and it is shown that the testator or parties habitually used them to describe a certain object.—Interpretation of Wills by Underhill and Strahan.

#### Section 62.

Scope.-Where the meaning of a will is doubtful, in such a case the Court is at liberty to have recourse to the evidence of the state of the testator's property; but where the words are plain, no such evidence is admissible. - Hensman v. Fryer, L. R. 3 Chan. 420. "In the case of Charter v. Charter (1874), 7 H. L. 364, a testator called Foster Charter, had three sons, Forster, William Forster-always known as William-and Charles. The first died before the testator made his will, the second lived at a great distance from the testator. and was not on good terms with him, and the third lived with the testator, his wife and his daughter Barbara, whom the testator in his will called "Barbara Forster." The will appointed "my son Forster Charter," xecutor, left him the house and farm by the testator at his death, made provision for Forster Charter and the testat it's wife and daughter ceasing to live together, and directed "my executor Forster Charter" to pay "Barbara Forster" an annuity. Probate having been granted to William Forster Charter, on a citation to recall probate: - Held, that direct evidence of declarations by the testator was not, but the evidence of the state, circumstance and habits of the testator and his family was admissible to show that by "Forster Charter" the testator meant Charles Charter.-Interpretation of Wills by Strahan and Underhill. See also the case of "Henderson v. Henderson, 1 I. R. 353.

### Section 63.

Principle.—We have seen at the outset that words in a will or deed will be held to be used in a sence different from their usual meaning under the following circumstances: When, being names or descriptive words, they properly describe no object in the condition of things with reference to which the will or deed was made, and it is shewn that the testator or parties habitually used them to describe a certain object. The same rule applies where the words in question refer not to the gift but to the object of the gift. If they apply apply to certain person, or class of persons, evidence will not be admissible to show that the testator or parties habitually applied the words improperly to other persons or classes of persons.—Interpretation of Wills by Underhill and Strahan. But "where the name or des-

cription of a legatee is erroneous, and there is no reasonable doubt as to the person who was intended to be named or described the mistake shall not disappoint the legatee."—Williams Executors, p. 1156.

But no extrinsic evidence is ad missible, but the Court is to ascertain the person intended by the contex t of the will only.—Mosumdar's Hindu Wills Act, p. 217

Illustrations .- From the illustrations it will be seen that there are three kinds of mistake contemplated by the section, name-Iv :-(1) Mistake in name, (2) Mistake in description, and (3) Mistake both in names and descriptions. From illustration (a) which falls to class (a) it will be seen that there is a person who answers to to the name but there is no one who answers to the description so in this case the description was followed. From illustration (c) it would be seen that there is none to answer to the description but there is one who answers to the name so legacy is accordingly distributed. But in illustration (b) there is a conflict between the name and the description. If we give preference to name in that only Thomas shall have the legacy but preference is given to description certainly in that case the legacy would go to Willam. We find no light from the section which to follow. "It may be stated as the result of the authorities and as a general rule, that the name or the description will prevail according as it is reasonably certain that the mistake is more likely to be made in name than in the description, or vice versa. If, on the other hand, the description is such as to particularise a certain person, and to have no doubt as to which of two person was meant, or such as itself to supply a motive for the gift, the description will prevail."-Mozumdar's Hindu Wills Act, p. 218. As regards mistakes both in name and description the Court should see which person is intended to be benefitted.

Class of legatees.—"Where there is a bequest to a class, and the intention of the testator is apparent to include all who constitute the class, th ugh by mistake he has specified a wrong number, the Court will not allow such an error to have an excluding operation, but will strike out the specified number."—(Mozumdar's Hindu Wills Act, p. 218. Illustrations (d) and (e) prove the same principle. Illustration (f) shows what should be the effect if mistakes in the description of a class of legatees take place.

### Section 64.

Note.—The letter so omitted must be supplied by the context. In the illustration if the gift to his daughtor B would have been five hundred gold mohurs in that case his daughter A also would have a legacy of five hundred gold mohurs, or in other words the words gold mohurs would have been supplied by the Court. But no extrinsic evidence is admissible.

#### Section 65.

Note.—Where a portion of the description is false but the thing can be sufficiently identified from the remaining portion of it, that portion which is not correct can be rejected. But in this case extrinsic evidence can be adduced to show that a portion can be so rejected.

#### Section 66.

Principle.—This section lays down the principle that, in cases of ambiguous description, if there are several terms of description applied to the subject-matter of a devise or bequest, every such term may be material, and if there is property corresponding with that which is devised in every particular, such property alone will pass to the exclusion of other property in part only answering the description.—

Henderson's Law of Succession.

#### Section 67.

Principle.-In construing a will or deed, the Court will not admit direct extrinsic evidence of the intention of the parties, for the purpose of assisting it to ascertain the sense in which the words were used, save when after construing the instrument in accordance with the rules an equivocation has arisen. Such evidence will then be admitted to resolve the equivocation. An equivocation arises where there are words in the instrument which, though applicable to one person or thing only, may be applied with complete accuracy, or, subject to the same inaccuracy, to two or more person or things indifferently. Here direct extrins c evidence of intention means evidence of what the testator expressed to be his intention in some other way than by his will.-Interpretation of Wills by Underhill and Strahan, pp. 42, 43. The above is a case of latent ambiguity because on the face of the instrument there is no ambiguity but which the help of extrinsic evidence such ambiguity is perceptible so the principle seems to be that inasmuch as ambiguity has been introduced by extrinsic evidence so extrinsic evidence is admissible to remove that ambiguity.

#### Section 68.

Principle.—Where the ambiguity or deficiency is apparent on the face of the will, the ambiguity is called patent ambiguity. It has not been created by extrinsic evidence and so extrinsic evidence is not admissible to remove it. The general principle of law is that no extrinsic evidence is admissible for the interpretation of a will. The only exception is that where the ambiguity has been caused by extrinsic evidence in that case only extrinsic evidence is allowed otherwise out. "It may be observed, that the general rule under this section is subject to this qualification,—that extrinsic evidence is admissible for the purpose of showing that the uncertainty which appears on the face of the instrument, does not, in point of fact.

exist; and that the intention of the party, though uncertainly and ambiguously expressed, may yet be ascertained, by proof of facts, to such a degree of certainty as to allow to such intention being carried into effect. But in cases falling within the scope of this observation the evidence is received, not for the purpose of proving the testator's intention, but for that of explaining the words which he has used."—Mosumdar's, Hindu Wills Act, 236. See also Administrator-General v. Money, 15 M. 448.

#### Section 69.

Note.—The primary rule of construing a will is that the meaning of any clause in it is to be called from the entire instrument, and all its parts are to be construed with reference to each other.—(Amir v. Kheta, 14 M. 65.)

#### Section 70.

Note.—A particular word in a will is to be interpreted by the help of other words in the same will. No extrinsic evidence is allowable. But the words are to be so construed that no portion need be rejected. If for this purpose any particular word or words can be interpreted in a wider or restricted sense. The same principle has been adopted in s. 71 infra.

#### Section 71.

Principle.—Where words are capable of a two bold construction even in the case of a deed, and much more of a will, it is just and reasonable that such construction should be received as tends to make it good.—(See Turner v. Frampton, 2 Cal. 331). It is a well-known rule of construction, that where words are susceptible of several interpretations, we are to adopt that which will give effect to every expression in the context in preference to one that would reduce some of those expression to silence.—Henderson's Law of Succession.

### Section 72.

Note.—The object of interpretation is to ascertain the intention of the testator for his words as expressed in the will. If possible no portion of the will is to be rejected if it is possible to reconcile their meaning. But where two clauses are irreconciliable in that case the last shall prevail.—(Vide s. 75 infra.)

### Section 73.

Scope.—When the subject-matter is the same and when it is apparent that the testator has affixed a particular meaning to a particular word in one part of his will, it shall be construed to have the same meaning in all other parts of it, unless it violates the sense.

But where the subject-matter is different, different interpretation can be given.—Vide Henderson's Law of Succession.

#### Section 74.

Principle.—The principle is that one who has executed a will must not be considered as an intestate. So his intention, so for can be carried should be carried.

## Section 75.

Scope.—It should be seen first of all whether the irreconciliable clauses or gifts are reconciliable by the help of rules laid down in foregoing sections. If they are not reconciliable in that case of course, the last shall prevail. The principle underlying this rule is that the "subsequent words are considered as being the most indicative of the testators intention."—Vide Mozumdar's Hindu Wills Act, p. 249.

#### Section 76.

Principle.—A bequest must be certain or capable of being rendered certain, both as to the subject-matter and object of it.—
(Mohun v. Mohun, 1 S. W. 201, Henderson's Law of Succession), So where a true equivocation arises, the gift must fall for uncertainty, unless there is evidence of intention produced to solve the equivocation.

—Underhill and Strahan, p. 46. When the amount is not definite or the part of share of a property or thing is uncertain the bequest is void. But when the amount or the part or share of a property or thing can be any how ascertained from other portion of the will, Court should do so. (Vide Mosumdar's Hindu Wills Act. pp. 252-253.) As regards void bequest for uncertainty vide 4 C. 508 J. 31 B. 583.

#### Section 77.

Note. So far as the property comprised in a document is concerned, the condition of things in reference to which the document is made is assumed, in the absence of a contrary intention, to be, in the case of a will the condition of things existing at the death of the testator.

Principle.—" Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." (7 W. 4 J. 1 Vic. C. 26 s. 24.) In construing a deed it is assumed, until the contrary is shown, that the condition of things in reference to which it was made was the actual condition of things at the time it was made. But in construing a will, as far as descriptions of property in the will are concerned, this rule is departed from. It is

assumed that the testator, knowing that his will would not come into effect till his death, intended the descriptions of property in it to be applicable to the property of his which answered such descriptions, not at the date of execution, but at his death. This was always the rule of construction so far as gift of pure personality were concerned, and it was extended to gifts of land by s. 24 of the Wills Act, 1837.—Interpretation of Wills by Underhill and Strahan, p. 118.

#### Section 78.

Explanation.—A gift, in a will, of property described in a general manner, whether by way of residue or not, will include not merely all property within the general description belonging to the testator but also all property which the testator had at his death a power to appoint by his will in any manner he might think proper, unless a contrary intention shall appear by the will itself.—(1bid, p. 147).

Appoint by Will.—The testator must have unrestricted power of appointing by will, otherwise such property will not come within the provision of the section.

## Section 79.

Default of appointment.—This section appears to deal only with the case of a "power given by the will not being exercised," but it is submitted that it would equally apply to the case of a power being exercised but improperly exercised.—Henderson's Law of Succession.

## Section 80.

Without any qualifying terms.—The expression "without any qualifying terms" in s. 80 of the Succession Act, 1865, refers to the bequest and not to the relations.—Pestonji v. Khursedbai, 7 Bom. L. R. 207.

## Section 81.

Note.—Under the section "the representative," etc., of the particular person do not take the gift beneficially, but hold it as part of the estate they represent. The words "representatives" and "legal representative" are construed to mean executors or administrators; but in some cases, be held to mean next-of-kin. The construction that the word "representatives" does not mean executors or administrators, but next-of-kin, is applied in general where there is no prior life-estate preceding the gift to a person or his representatives.—

Henderson's Law of Succession.

#### Section 82.

Note.—If an estate be given to a man, simply, without express words of inheritance, or if there be added to such a gift an imperfect description of it as a gift of inheritance, it will pass the entire estate of the testator.—(Tagore v. Tagore, 9 B. L. R. 377). But where a bequest of immoveable property is made to a Hindu wife in general terms without any express words creating an absolute estate under the Hindu law it conveys only a limited interest.—Bhobotarini v. Peary, 24 C. 646.

#### Section 83.

Note. This section safeguards failure of gifts by lapse.

#### Section 84.

Note.—By the English law, the general rule is, that where the personal property is given in terms that would carry the fee-simple in land, the gift is absolute. A bequest to "A and his legal representatives," to "A and his heirs or representatives," gives the absolute interest, the additional words being merely words of limitation, and not of purchase. So a bequest to A and the heirs of his body will pass an absolute estate,—(Henderson's Law of Succession.) If it appears from the will that the testator had a contrary intention i.e., these words are not words of limitation in that case both the persons named take concurrently.

## Section 85.

Class.—A gift is made to a class when (whether the donees are individually named or not) it appears from the instrument of gift; (1) That they are to take as persons coming within a general description (i.e., as a true class); or (2) That although one general description will not cover the donees, yet that the donor intended them to take not as individuals, but as members of a body of persons.—Vide Underhill and Strahan, p. 92.

Gift to a class—A gift to a class implies an intention to benefit those who constitute the class and to exclude all others; but a gift to individuals described by their several names and descriptions, though they may together constitute a class, implies an intention to benefit the individuals named. In a gift to a class you look to the discription, enquire what individuals answer to it, and those who do answer to it, are the legatees described. Generally speaking every person who at the time of the testator's death falls within the described class will be entitled; but where it appears from express declaration, or clear inference upon the will that the testator intended to confine his bequest to those only who answered the description at the date of the instrument, such intention must be carried into effect,—Henderson's Law of Succession.

#### Section 88.

Gifts.—Where there are two gifts to the same preson in such a case the gift is called double gifts: They may be divided into four classes:—(a) where the same specific thing is given twice; (b) where the equal quantity is given twice; (c) when the second is greater in amount than the first and (d) when the second is less in amount than the first. Besides, such gifts may be made either in the same instrument or in different instruments. The general rule applicable in such cases is, that where the bequest are of the same thing or are equal in amount, and are in the same instrument, the second is to be considered as a mere repetition of the first; but where the bequests vary in amount or kind, or are in different instruments, the second is cumulative and not a mere repetition or substitution of the first.—

Mosumdar's Hindu Wills Act, p. 290.

Illustrations.—In illustration (a) the same thing is given twice by the same instrument so it falls under clause (1). Here a specific thing is bequeathed by two different instruments (will and codicil vide Explanation of the section) to the same person so clause (1) is applicable. Illustration (c) falls under clause (2) because the amount is same and both the bequests have been made by the same instrument. Illustration (d) falls under clause (3) because here the amount is different. In illustration (e) although the amount is the same but the instrument is different (vide, Explanation to the section) so the legatees take under both the instument. In illustration (f) the amount is not the same so also the instrument. Illustration (g) shows that although the nurse should get only Rs. 1,000 yet the intention of the testator being clear to benefit the nurse by leaving behind the nurse Rs. 1,000, his intention was carried into effect. Illustration (h) falls under clause (2). Illustration (i) proves the theory of intention.

## Section 89.

Residuary legacy.—No particular word is needed to constitute a residuary legacy. If it is clear from the words of the testator that a legatee should be given a particular estate, in that case effect should be given to his intention.—Vide 4 C. 443; 5 C. 438.

## Section 90.

Note.—A residuary legatee is entitled not only to every thing which is undisposed of but also to every thing as regards which the disposition has failed. This is clear from the illustration given under the section.

#### Section 91.

Principle.—In all matters of testamentary gifts, the Courts in pursuance of the fundamental principles of construction are always

averse to declaring that a gift made by a testator must fail, or even be in suspense. That is to say, where the testator's language is ambiguous, obscure or doubtful, the Courts are always in favour of a construction which makes a legacy vested rather than contingent, or if contingent, will make it vested as soon as possible.—Mozumdar's Hindu Wills Act, p. 312.

#### Section 92.

Principle.—A will takes effect from the time of the death of the testator so where a legatee dies or ceases to exist before that date his heirs get nothing under the will. The failure to take effect is called lapse. But a testator may prevent a legacy from lapsing. In order to do this he must give the property to another person in substitution or he must appoint a residuary legatee. But the mere declaration that the legacy will not lapse is not sufficient,—(Vide Mosumdar's Hindu Wills Act, p. 315).

#### Section 93.

Joint tenancy.—Where realty or personalty is given by deed or will to several persons nomination, or to a class of persons without more, then whether such persons are individuals or corporations, they will take as joint tenants: But where there are words of severance there is no joint tenancy in equity. By words of severance is meant any indication that the donees were intended to take distinct interest. In case one of the joint tenants dies the remaining one takes the whole state by survivorship.—(Vide Underhill and Strahan, pp. 230-238.) So also in case where the property is bequeathed in joint-tenancy the legacy does not lapse unless all of them die before the testator.

## Section 94.

Note.—If it appears that the legatees are not to take as joint tenants in that case the deceased legatee's share lapses.

## Section 96.

Note.—This is an exception to general rule. To prevent the lapse of a legacy under this section, it is not necessary that the lineal descendant, who is alive at the death of the testator, should be the same lineal descendant who was alive at the death of the legatee.—Henderson's Law of Succession.

### Section 98.

Bequest to a class.—Where a bequest to a class does not offend againt the rule as to perpetuities, the only question is, what was primary and secondary intention of testator. In case of gift to a class consisting of children or descendants, some of whom cannot take,

the testator may be said to have a primary and secondary intention, former being that all members shall take, and latter if all cannot take then those who can shall do so, and the general rule is, that those members of the class take who are capable of taking at death of testator. There is no rule in Hindu Law to the effect that a gift inter vivos, or a bequest to a class of persons some of whom are capable of taking by reason of rule that gift is valid only if it is made to a sentient being capable of taking, is void also as regards those who are in existence and capable of taking.—Bhagabati v. Kali, 32 C. 992.—See also Kinney's Hindu Wills Act, p. 155.

## PART XII.

#### Section 99.

Note.—The exception to the section, which deals with the case of deferred gifts, expressly declares, that, in case of a gift to persons described as standing in a particular degree of kindred to a specified individual, the gift is to take effect if any person answering the description comes into existence between the death of the testator and the time to which possession is deferred. Illustrations (b), (c), and (d) are examples of gifts deferred; by reason of prior bequest; illustration (e) of a gift deferred "otherwise."—Henderson's Law of Succession.

Application of this section to Hindus.—At one time it was thought that this section is not applicable to the Hindus. But subsequently it was held that it would be applicable to the Hindus so far as it did not contravene any rule of Hindu Law.—Vide Mosumdar's Hindu Wills Act, p. 347.

## Section 100.

Note.—Section too contemplates a power of disposition extending further time than that allowed by the Hindu Law, and the principle enacted by that section did not apply to this case.

## Section 101.

Note.—Section 101 is a restriction on the rule as to perpetuities under English law. By that law the vesting of property might be postponed for any number of lives in being and an additional term of 21 years afterwards, and for as many months in addition as are equal to the ordinary period of gestation, exist; and the additional term of 21 years might be independent or not of the minority of any person to be entitled.—Henderson's Law of Succession.

This section allows the vesting to be delayed beyond the lifetime of persons in being, for the period only of the minority, of some

Ind. Suc. Act. -2.

persons born in their lifetime; and under s. 3 the period of minority of persons governed by this Act is 18. The addition of an absolute of 21 years has been done away with by the section.—Ibid.

According to Hindu law no one who was in existence at the death of the testator can inherit.

#### Section 102.

Principle.—"The reason why a gift to a class, as children or the like is void, when it embraces some objects too remote is this: there is no intention to give to any member short of the whole class; and therefore, if the prescribed limit be transgressed, the whole gift falls, because it does not necessarily take effect within the prescribed period."—Dungannon v. Smith, 12 U. & F., p. 575. Vide Henderson's Law of Succession.

#### Section 103.

Principle.—"It was void, not because it was not within the time of perpetuity, but on the ground that the limitation over was never intended by the testator to take effect, unless the persons whom he intended to take under the previous limitation would, it they had been alive, have been capable of enjoying the estate; and that he did not intend that the estate should wait for persons to take in a given event where the person to take was actually in existence, but could not take,"—Beard v. Westcott, 5 B. and Ald. 801. Vide Henderson's Law of Succession.

## Section 105.

Scope.—It provides against death-bed bequests to charitable uses by persons having near relations. According to the table of consangunity fixed, s. 24 supra, such death-bed bequests cannot be made by persons having a father, mother, son, daughter, grandfather, grandmother, grandson, granddaughter, brother or sister.—Vide Henderson's Law of Succession. Examples of religious or charitable uses are given in the illustration.

## PART XIII.

### Section 106.

Note,—Beneficial interests in property under wills and settlements are either indefeasibly vested, or conditional. An interest is indefeasibly vested when, although actual enjoyment may be postpened, the donee has acquired a proprietary right to it which is not subject to any condition, either precedent or subsequent. Unless, therefore, the interest is restricted to the life of the donee it is transmissible on his death. An interest is conditional when it is either contingent, or vested subject to be divested.—Interpretation of Will by Underhill and Strahan, p. 252. Vide 8 Cal. 378.

# Section 107.

Contingent Interest.—A contingent interest is one in which the donee takes no proprietary interest at all, unless and until some specified event happens. Such a condition is called a condition precedent. A contingent interest is only transmissible on the death of the donee when the condition is not personal to him, and is capable of being performed by his sequals in title.—Interpretation of Will by Underhill and Strahan, 252.

Bequest vested in interest subject to being divested.—There is an important distinction between contingent bequest and bequest vested in interest subject to being divested. In the latter there is no condition precedent to vesting, but the interest is to be taken away from the donee in certain events and give to another. Such a condition is called a condition subsequent. An interest vested subject to be divested is transmissible on the death of the donee, unless the divesting condition takes effect.

When a condition is illegal or impossible of performance other wise than by reason of the acts or defaults of the done, then if it is a condition precedent the gift is altogether void; but if it is a condition subsequent, the first gift is indefeasible, and the gift over is void. Thus, a bequest to A, if he shall within six months horsewhip X is void altogether. Whereas, had it been worded as a gift to A, subject to a gift over to B, if A, should not horsewhip X, within six months the gift to A, would have been absolute and indefeasible, over to B, void. In the first case there is no gift at all to A, unless he does an illegal Act. In the second case there is nothing taken away from A, unless he does the act. In both cases the law forbids the act and will not allow any one to take advantage of its performance.—Underhill and Straham's Law of Interpretation of Wills, pp. 264-265.

# PART XIV.

# Section 109,

Note.—This section contemplates cases, as appears from the illustration where, by the same will, several properties; some of which are beneficial and others onerous or burdensome, are given to the same person, not separately and independently as the next section, but together as one entire gift.—Mosumdar's Hindu Wills Act, p. 407.

## Section 110.

Note.-Here the bequest is independent and separate.

#### Section 111.

Scope.—In this section as well as in s. 107 (supra) the interest is contingent. In both cases the legacy depends upon the happening or not happening of certain events. But there is some difference between this section and that section. There the legacy does not vest until a certain event happens where the bequest is contingent upon the happening of a specified uncertain event and also it does not vest until the happening of a certain event becomes impossible where the bequest is contingent upon the not happening of a specified uncertain event. But in this section the bequest also is contingent upon the happening of a specified uncertain event, but no time is mentioned for the happening of the event. In such a case the bequest fails unless such event happens before the period when the fund bequeathed is payable or distributable.

#### Section 112.

Illustrations.—In illustration (a) the gift is immediate and the period of distribution is the death of the testator. In illustration (b) the period of distribution is the termination of the life of A. Illustrations (c) and (d) contemplate cases where a contrary intention appears from the will.

#### Section 113.

Condition precedent and subsequent.—There are two kinds of conditional bequest. When the bequest depends upon the happening of some event there the condition is precedent. In cases of condition subsequent a bequest can be defeated by the happening some event.

Scope.—In this section the condition contemplated is condition precedent. So where the performance of the condition is impossible the bequest also fails.

## Section 114.

Note.—A bequest by a testator conditional on the continuance of immoral relations between himself and the legatee is void.—Faya v. Sita, 25 M. 613.

### Section 115.

Substantial compliance,—"Where literal compliance with the condition becomes impossible from unavoidable circumstances, and without any fault of the party, it is sufficient that it is complied with as nearly as it practically can be, or as it technically called cypres."—Mosumdar's Hindu Wills Act.

## Section 116.

Principle.—"Instances have frequently occurred in which the Court has concluded from the context of the will, that the intention of the testator is effectually fulfilled by regarding a clause of apparent condition as a clause of conditional limitation, so as to require, as in the case of a gift on condition, that the very event on which the gift is made contingent must be fulfilled with strict exactness, but paying regard, in the construction, to the substantial effect of the contingency specified and so the real interest of the testator."—Williams on Executors; vide also Henderson's Law of Succession.

## Section 117.

Note.—This section qualifies the rule laid down in the preceding section.

### Section 118.

Note.—It is kind of conditional bequest. But here the condition is condition subsequent.

## Section 119.

Illustrations.—As regards illustration (b) the law of England is that regarding personal estate the condition is not binding but as regards real estate it is so. In illustration (d) both A and B take vested interest and the condition is that if one of them die during the lifetime of C in that case the survivor would take the whole estate. But here both A and B died during the lifetime of C so the estate is not divested, and as such the representatives of A and B would take the estate in equal shares. As regards illustration (e), the Vice-Chancellor Sir John Leach said: "The vested interests first given by the will are, by the form of the expression, only defeated in case there shall be some, or one, and not all of the children living at the mother's death; but that even did not happen, for there was not one child living at the mother's death."—Sturgess v. Peurson, 4 Mad. 411. Vide Henderson's Law of Succession.

Note.—"In order to divest a vested estate or interest by gift over, the very event must happen; or in other words, the condition must be strictly fulfilled." (Henderson's Law of Succession.) Here also the ulterior bequest is dependent upon a condition subsequent as distinguished from condition precedent. If the specified condition happen in that case the estate will be divested.

"A provision purporting to divest in certain events a gift once vested, is not favoured by the Court, which will be astute to find other expressions, making it doubtful whether the document should

be interpreted literally, in which case the gift over will be restricted to the happening of the contingency before the first gift is vested. In particular, in gifts by will to the children of a tenant for life, with a gift over if he dies without leaving children, the gift over will be restricted to the case of his dying without having had a child who attained a vested interest.

"Where, however, the instrument will not bear this interpretation then the gift over will be strictly construed, and will not take effect unless the exact contingency is indicated with certainty and actually happens."—Interpretation of Wills by Underhill and Strahan.

#### Section 120.

Illustrations.—In illustration (a) the performance of the condition is an impossibility and in illustration (b) the condition is contrary to public policy. Here the gift over cannot take place so the bequest is not affected.

#### Section 123.

Note.—Here the condition is condition precedent but the performance of the act is indefinitely postponed.

## PART XVII.

### Section 125.

Note,—Where a testator leaves legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment to secure certain objects for the benefit of the legatee, and where such object fails, the absolute gift prevails, and does not fail into residue.—(3 Cal. s. 553; See also Kinney's Hindu Wills Act.) The principle upon which this section is based, is that a Court of Equity will not compel that to be done which the legatee may undo at the next moment.—Henderson's Law of Succession.

## Section 126.

Absolute gift.—'This section contemplates cases in which there is a bequest absolute in form, and then a revocation or qualification of it for purposes which fail. As to such bequests, the rule is, that, 'if a testator leaves a legacy absolutely as regards his estate, but rescricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee upon failure of such objects, the absolute gift prevails,'—(Campbell v. Brownrigg, 1 Phill, 301.) But if there is no absolute gift, as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those mode of enjoyment fail, the legacy forms part of the testator's estate, as not having, in such event, been given away from it. In the latter case,

the gift is only for a particular purpose; in the former, the purpose is the benefit of the legatee, as to the whole amount of the legacy, and the directions and restrictions are to be considered applicable to a sum to longer part of the testator's estate, but alrerdy the property of the legatee.—[Lord Cottenham, in Lassence v. Tiervey, I Mac. and G. 551]."—Mosumdar's Hindu Wills Act, p. 463.

## Section 128.

Scope.—"This section in question follows the English rule that, if a legacy is given to an executor, he must accept the office or manifest an intention of acting; but the rule is there based upon a presumption that a legacy to a person appointed executor is given to him that character and this presumption can be rebutted by 'some thing in the nature of the legacy or circumstances arising on the will.' Whether it can be rebutted by parol evidence is more questionable. I am of opinion that the evidence is not admissible in this country, and for this reason, that s. 128 leaves no room for a presumption. The language is peremptory; it is not left to the Court to decide whether the legacy was given to the person named in his character as executor. It is assumed that it was so given and the prohibition follows."—Per Macpherson, J., p. 83 (87).

## Section 129,

Different kinds of legacy.-Legacies are of two kinds.

- (1) General (2) Specific.
- (1) General legacy.—A legacy is general when it is so given as not to amount to a bequest of any particular money or thing of a testator, distinguished from all others of the same kind, but is a bequest of something which is to be provided out of the testator's general estate.
- (2) Specific legacy.—Where a testator bequeaths to any person a specified part of his property, which is distinguished from all other part of his property, the legacy is said to be specific. In other words, a lagacy is specific, when it is a bequest, of a particular thing, or sum of money, or debt as distinguished from all others of the same kind. The Courts are rather averse to construing a legacy as specific, unless the intention of the testator is very clear.—Vide also Mozumdar's Hindu Wills Act, p. 482.

## Section 130.

Note,—If the intention of the testator to bequeath the identical stock or fund, in that case the bequest would be specific. But in order to construe a bequest as a opecific bequest the intention of the testator must be very clear.

#### Section 131.

Note.-"The mere possession by the testator, at the date of the will, of stock, etc., of equal or larger amount than the legacy, will not make the bequest specific, when it is given generally of stocks or annuties, or of stocks or annuities in particular funds, without further explanation for the testator might mean only to direct his executor to purchase with his general estate so much stock, etc., in the fund described, and therefore that clear intention, which is requisite for making a legacy specific does not here exist. If, indeed, it clearly appears from the context, that the testator meant to bequeath the identical stock, etc., he was possessed of at the date of the will, such manifest intention will render the legacy specific, although the testator has not expressly declared such intention, nor expressly referred to the stock. Thus, if a person having f,1,000, three per cent. consols, bequeath £1,000, three per cent, consols to trustees, in trust to sell the benefit of the legatee, the bequest will be specific; the intention being manifest, not conjectural, from the direction to sell three per cent consols, that the testator referred to the stock he then had."-Williams on Executors, pp. 1169-70; Mosumdar's Hindu Wills Act. p. 486.

#### Section 132.

Note.—Here the direction is looked upon as a direction for the mere convenience of the estate.—Tagore Law Lectures, 1887, p. 280.

#### Section 133.

Note.—A general residuary clause is not the less general because it contains an enumeration of some of the items of which it may consist, and the articles enumerated will not be deemed to be specifically bequeathed.—Tagore Law Lectures, p. 281.

### Sections 134, 135.

Note.—In case of property specifically bequeathed to two or more persons in succession, it must be retained in the form in which the testator left it, although it may be of such a nature that its value is continually decreasing, as in the case of leaseholds or annuities for the life of a third person, where it might happen that the bounty intended for the subsequent taker might be defeated by the first taker living as long as the term of the lease or annuity lasted.

But where property comprised in a bequest to two or more persons in succession is not specifically bequeathed, the Indian Succession Act, following what is konwn as the rule in Howe v. Lord Dartmouth, 7 ves. 137, provides that in the absence of any direction to the contrary it shall be sold and the proceeds of the sale invested in such securities as the High Court may, by any general rule to be made from time to time, authorise or direct, and the fund thus constituted shall be

enjoyed by the successive legatees according to the terms of the will. In all such cases it is a question of intention of the testator to be gathered from the whole will; and unless some expression can be gathered from the will that the property is not to be enjoyed in its existing state, the rule must be applied. The mere absence of any direction to convert will not preclude the application of the rule. Where, however, there is an indication of intention that the property is to be enjoyed in its existing state, it must be so enjoyed.—Tagore Law Lectures, 1887, p. 281.

## Section 136.

Note.—A specific legatee has the advantage, that, if the assets are difficient, he takes the very thing bequeathed to him without any abatement. On the other hand, if the testator sells the thing given, the legacy falls altogether.—Henderson's Law of Succession, p. 171.

### Section 137.

Note.-Where a testator bequeaths a certain sum of money, or a certain quantity of any other commodity, and refers to a particular fund or stock, so as to constitute the same the primary fund or stock out of which payment is to be made, the legacy is said to be demonstrative. In other words where specified property is given to the legatee, the legacy is specific; where the legacy is directed to be paid out of a specified property it is demonstrative. Demonstrative legacies are specific in one sense, and general in another; specific, as being given out of a particular fund, and not out of the estate at large; general, as consisting only of definite sums of money and not amounting to a gift of the fund itself or any aliquot part of it. A demonstrative legacy, too, is so far specific that it will not be liable to abate with general legacies upon a deficiency of assets. It is liable to abate, however, when it becomes a general legacy by reason of the failure of the fund out of which it is payable. Where the subjectmatter of a specific bequest produces income, the bequest carries the income accruing from the date of the testator's death, for the specific legacy vests from the time. A demonstrative legacy however, does carry income or interest from the testator's death .- Tagore Law Lectures (1887), p. 283. If the fund out of which the demonstrative legacy is to be paid fail, the legatee will not be deprived of his legacy but will be permitted to receive it out of the general assets,-Williams on Executor.

## Section 138.

Illustration.—Here the legacy to C is clearly demonstrative, while that to A is specific. In such a case the specific legacy must be paid first, and the other out of the residue. If the residue be insufficient the balance of the demonstrative legacy must be paid out of

the general assets of the testator.—Vide Tagore Law Lectures (1887), p. 283.

#### PART XXI.

#### Section 139.

Note—It may be noted that where property is specifically bequeathed, and after the execution of the will the testator sells it, it is hereby adeemed, and should he purchase it again before his death it will not go under the description.—(Underhill, p. 122.) "Ademption is a mode of implied revocation." The distinction between ademtion and revocation chiefly consists in the fact that, "although a will can be neither wholly nor partly revoked or abandoned by words, parol evidence is admissible to establish either a total or a partial ademption of a legacy." To revoke is to destroy the operative power of the instrument by some act done with the intention of destroying; whereas to adeem is not to destroy such power, but to withdraw the subject of gift from the operation of it, thereby rendering the power inoperative with respect to any particular gift.

In ademption again it is immaterial whether or not the testator intended to adeem the gift. Thus the question is, not one of construction of the will, as it is in revocation, "but of construction of an act in no respect testamentary."—(Mosumdar's Hindu Wills Act, p. 500.) It is in fact a consequence of the very nature of a specific legacy that this effect takes place. If the subject-matter of the legacy is only partially extinguished there will be only a partial ademption. The principle of ademption does not apply to demonstrative legacies, for on the failure of the fund out of which they are payable, they are to be paid out of the general assets.—Tagore Law Lectures (1887), p. 284.

### Section 140.

Note.—The fund out of which demonstrative legacy is to be paid is merely the primary fund out of which the payment is to be made. If that fund fails it is to be paid out of the general assets.

## Sections 141, 142.

Note.—If a portion of an entire fund or stock be specifically bequeathed, the receipt by the testator of a portion of the fund or stock will operate as an ademption only to the extent of the amount so received; and the residue of the fund or stock will be applicable to the discharge of the specific legacy.—Tagore Law Lectures (1887), p. 288.

### Section 143.

Note.—Although all cases of ademption arise from a supposed alteration of the intention of the testator, it has been said that the only

rule to be adhered to is to see whether the subject of the specific bequest remained in specie at the time of the testator's death, as the idea of discussing the particular motives and intention of the testator in each case in destroying the subject of the bequest would be productive of endless uncertainty and confusion. Thus, if stock is specifically bequathed the legacy will be adeemed, if it is not in existence at the testator's death. There will be an ademption pro tanto if part of the stock specifically bequeathed has ceased to exist.—Tagore Law Lectures (1887), p. 214.

#### Section 144.

Note.—The illustration to this section shows that the specific legacy must be paid at all events and so much of the demonstrative legacy as cannot be paid out of the specified fund is to be paid out of the general assets of the testator. If after paying the specific legacy nothing remains for payment of demonstrative legacy, the whole amount of the demonstrative shall be paid out of the general assets.

#### Section 145.

Note. - Vide Note under s. 143.

Section 146.

Note .- Vide Note under s. 143.

### Section 147.

Note.—In general, a bequest of goods in a particular place is adeemed by their removal to another place.—(Grsen v. Symonds, I Bro. L. C. 128 N.) But a removal of a thing specifically bequeathed for temporary purposes as for repairs, or for safe custody, or preservation from fire, will not operate as an ademption. Nor will wrongful conversion by a third person defeat a specific legacy given by the testator.—Henderson's Law of Succession.

## Section 148.

Note.—"It must be a question of construction whether a locality referred to is essential to the bequest or merely descriptive." The nature of the place is some times a criterion. In illustration (e), s. 148; for instance, the reference to the locality is purely descriptive; because the goods could not be intended to remain indefinitely on board the ship, and therefore their removal to a warehouse where they are to remain till his death, would not operate as ademption.—Mosumdar's Hindu Wills Act, 507; Henderson Law of Succession.

## Section 150.

Note.—"There is no ademption where a thing specifically bequeathed audergoes a change between the date of the will and the

testator's death, and the change takes place by operation of law, or in the course of execution of the provisions of any legal instrument under which the thing bequeathed was held, as where stock specifically bequeathed is changed by Act of Parliament or by Act of the Legislatures of India."—Tagore Law Lectures (1887), p. 286.

#### Section 151.

Note.—In such a case the presumption is that the testator had no intention to change description of the bequest and in the absence of any such presumption, the legacy is not adeemed.

#### Section 152.

Note.—Here the intention of the testator is to keep that stock so that it may be the subject-matter of the specific bequest.

#### Section 153.

Note.—The rule of English Law is that a legacy once adeemed by sale will not be revived by a purchase of a similar stock by the testator.—(Henderson's Law of Succession.) But this section has been framed in accordance with the dictum of Lord Talbot (in Partridge v. Partridge cases, Temp. Talb. 227) to the effect that "If the selling out stock is an evidence to presume an alteration of the intention of the testator, surely his buying it again is as strong an evidence of his intention that the legatee should have it again."—Henderson's Law of Succession.

## PART XXII.

## Section 154.

Note.—"S. 154 of the Indian Succession Act, it is to be observed, refers only to pledges, liens, or incumbrances created by the testator himself, and a periodical payment in the nature of land-revenue or in the nature of rent is declared not to be an incumbrance within the meaning of the section. In England, a distinction was made between charges created by the testator himself and liabilities incident to the thing bequeathed. From the former, the legatee in England was entitled to exoneration." As regards latter vide ss. 156 & 157, infra.

#### Section 155.

Note,—"If the purchaser of real estate dies without having paid the purchase-money, his heirs-at-law, or the devisee of the land purchased, will be entitled to have the estate paid for by the executor and administrator. So where the vendor has a good title, the devisee, if he pay for the estate, may call upon the executor to reimburse him from the personal estate."—Tagore Law Lectures, (1887), p. 294.

## PART XXIII.

### Section 158.

Illustrations.—In illustration (a) the bequest is described in general terms so the executor must provide the legatee with such article, if the state of the assets will allow it; but in illustration (b) the bequest is not in general terms or in other words here the bequest is specific so it must all if A had no carriage horses at the time of his death. "In Evans v. Tripp, 6 Mad. Sir John Leach, V. C., said,—'A gift of my grey horse' will pass a black horse, which is not stretly grey, if it be found to have been the testator's intention that it should pass by that description; but if the testator has no horse, the executor is not to buy a grey horse."—Henderson's Law of Succession.

## PART XXIV.

## Section 159.

Note.—"Where the 'interest' or 'produce' of a fund is bequeathed to a legatee, or in trust for him, without any limitation as to continuance, the principal will be regarded as bequeathed."—Williams on Executor.

Fund.—Although in the section the words "produce of a fund" are used still it refers to lands producing rents and profits (Vide illustration (c) as well as the case of Hemag ini v. Nobin Chand, 8 C. 778), where the testator gives property to pay, among other purpose, certain annuity to certain persons and heirs for ever. Held under circumstances gifts of share of rents and profits amounted to a gift of corpus.

## PART XXV.

### Section 160.

Note,—There is a marked difference between this section and the previous one. An annuity may be perpetual, or for life, or for any period of years but the presumption is that it is for life. But contrary intention in the will will change its character.

### Section 161.

Note.—Here the bequest is for the sole benefit of the legatee but with a direction that he is to enjoy it in a particular manner. In such a case the general principle, "that where the purpose of a gift is for the sole benefit of the donee himself, he can claim the gift without applying it to the purpose" is applicable. (Vide Henderson's Law

of Succession; William's on Executor, p. 1033, 10th Edition.) This section is also based upon the well-known doctrine of equity that "equity will not compel to do what the legatee may undo the next moment."—(Vide Ibid.) "This rule is so jealously observed that, even where the testator positively declares that the legatees snall not be permitted to receive the moaey, the Court will hold such declaration as in operative. [Re Mabbett (1891) 1 Ch. 707]"—Vide Mosaumdar's Hindu Wills Act, p. 532; In re Robbins (1890), 2 Ch. 648.

Illustration (b).—Here the legacy is a vestel legacy and as such C having vested interest in it, it passes to his representatives after his death.—Baley v. Bishop, 9 Ves. 6.

#### Section 162.

Abatement of annuity.—"The reason is, that the testator, in the absence of clear and conclusive proof to the contrary, must be deemed to have considered that his estate would be sufficient, and consequently not to have thought it necessary to provide against a deficiency by giving a priority, in case of a deficiency, to some of the objects of his County." (Miller v. Huddlestone, 4 Mac. and G. 523.) So the annuity and the general legacy will abate proportionally. "In such cases a value is put upon the annuity, and then a proportional abatement is made between the annuity and the legacies, and then the annuitant (although it is only a life annuity), or his representative, if he be dead, is entitled at once to receive a sum equal in amount to the valuation so abated."—Mojumdar's Hindu Wills Act, p. 533.

Valuation of annuity.—The value of annuities is to be ascertained thus according to English law. "If all the annuitants be living at the period of division, the value must be ascertained at the death of the testator. If they be all dead, the value must be taken to be the respective amounts of arrears; but if some be dead and others living, the value, as to the former, will be taken at the amount of their arrears, and as to the latter, at the amount of their arrears added to the calculated value of the future payments."—Todd v. Bielby, 27 Bear 353.

## Section 163.

Note.—"The general rule is, that if there be a clear gift of a life-interest and of a reversion, and the estate proves insufficent, each party, the tenant for life and the reversioner, must bear the loss in proportion to his interest; but that if there is a gift of an annuity and a residuary gift, the annuity takes precedence and the whole loss falls on the residuary legates."—Croyly v. Wield, 3 Deg.—M. and G. 995.

# PART XXVI.

## Section 164.

Note.—"It is a rule in Equity, that where a debtor bequeaths to his creditor a legacy equal to, or exceeding the amount to his debt, it shall be presumed, in the absence of any intimation of a contrary of the debt, but that where the legacy is of less amount than the debt, it shall not be deemed a part payment in satisfaction. The rule, however, though it has long prevailed, has met with the censure of several eminent Judges, and the Courts in England have inclined to lay hold of any minute circumstances whereupon to ground an exception to it."—Tagore Law Lectures (1887), p. 301.

Law Commissioners' Report — Here, as elsewhere, we have departed from the English law, where its provisions appeared to us objectionable in themselves, or especially inapplicable to India. Above all things we have aimed at giving effect to the plain meaning of the words of the testator, without endeavouring to do, or say for him, that which he has not done, or said, for himself."

## Section 165.

Law Commissioners' Report.—"We have, in like manner, discarded the rule of English law, that where a father bequeaths a legacy to a child and afterwards advances a portion for that child, he thereby advances the legacy. We have endeavoured so to frame the law in this respect as to prevent the occasion from ever arising, which in England requires a nice b lancing of judgment, a large discretion, the prosecution of a difficult enquiry, and the admission of parol evidence of the intentions of the testator."

## Section 166.

Note.—"Again, while in England, where a parent gives a legacy to a child and afterwards, on the marriage of the child, or on any other occassion, makes a provision for it, that provision will be presumed to be, if equal or greater, a complete satisfaction if less, a satisfaction pro tanto, of the legacy, under the Indian Succession Act no bequest is either wholly or partially adeemed or satisfied by any subsequent provision made by settlement, or otherwise, upon the legatee. The reason for the departure from the English law have already been referred to in the extract quoted from the port of the Law Commissioners."—Tagore Law Lectures (1887), p. 303.

### PART XXVII.

#### Section 167.

Election.—" Election' may accordingly be defined to be 'obligation imposed upon a party to choose between two inconsistent and alternative rights, or claims, in cases where there is clear intention of the person, from whom he derives one, that he should not enjoy both. Every case of election, therefore, pre-supposes a plurality of gifts or rights, with an intention, express or impled, of the party, who has a right to control one or both, that one should be a substitute for the other. The party who is to take has a choice; but he cannot enjoy the benefits of both. '—Story's Equity Jurisprudences 1075;" Mojumdar's Hindu Wills Act, p. 542.

Principle.—"The doctrine has been thus stated and explained: He who accepts a benefit under a deed or will must adopt the whole contents of the instruments, conforming to all its provisions and renouncing every right inconsistent with it."—Tagore Law Lectures (1887), 303.

#### Section 168.

Disappointed legatee.—In illustration (a) to s. 169, B is the disappointed legatee. Here the sum of Rs. 1,000 is subject to the charge of the value of Sultanpur which is Rs. 800. The rest shall devolve as if it had not been disposed of by the will in favour of C.

### Section 170.

Note.—"A bequest for a man's benefit as for the payment of his debt, is for the purpose of election, the same thing as a bequest made to himself, but a person taking no benefit directly under the will, but deriving a benefit indirectly, is not put to his election."—Tagore Law Lectures (1887), p. 308.

## Section 171.

Note.—Here D is indirectly benefited by the will. He, having received nothing under the will, cannot be said to have derived any benefit under the will directly.

## Section 172.

Mote.—Vide Premada v. Lakhi, 12 C. 60.

### Section 173.

Note.—Where the legatee has full knowledge of his right to elect, election by him can be presumed when he accepts benefit given by the will.

## Section 174,

Enjoyment.—Here the actual enjoyment of benefit for two years is necessary to give rise to necessary presumption.

# PART XXVIII.

## Section 178.

Donatio mortis Causa.—This section does not apply to the Hindus. Immoveable property cannot be made subject to this gift. Only gift can be made, in this form, of moveable property.

# PART XXIX.

## Section 179.

Note.—This section has been reproduced in s. 4 of the Probate and Administration Act, V. of 1881; only a new paragraph has been added.

Executor and Administrator.—Under s. 4 of the Probate and Administration Act, "the Executor or Administrator, as the case may be of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vests in him as such.—Ambica v. Kula, 10 C. W. N. 422.

Vesting of property in executor, etc.—All property vests in the executor as if he is the legal heir of the deceased testator. But the question is when the property vests in the executor. As regards Administrator it is certain that property vests in him from the time of getting the letters of administration. According to English law it vests in the executor from the moment of the testator's death. But it held that according to s. 4 of the Probate and Administration Act it vests in the executor from the date of the grant of probate.—Sarat v. Bhupendra, 25 C. 103; Behary v. Juggo, 4 C. 1; Kurrutulan v. Peaeu, 33 C. 116; Munisami v. Mamthammal, 20 M. L. J. 689, but see 31 B. 418; 9 Bom. L. R. 287; 22 M. L. J. 228; 27 B. 281.

## Section 180.

Note.—"A question has often arisen as to what wills are entitled to probate in the English Court, and it appears to be now settled that a will disposing solely of property situate abroad will not be admitted to probate here, unless it is incorporated by reference in another will entitled to probate on its own account, as disposing of property within his jurisdiction. But it seems that a mere meation in the English will of an intention to ratify and confirm the

foreign one will be sufficient to incorporate it, so as to entitle it to probate. And where a testator expressed a distinct intention, in a will disposing of British property, that it should be regarded as independent of, and disconnected from, his general will, which disposed of other property in America at much greater length, Sir J. Hannen allowed the English will to be admitted to probate alone, an authenticated copy of the American will and codicils being ordered to be filed in the registry, and a note of such filing appended to the English probate."—Foote's Private International Law, p. 280.

#### Section 182.

Note.—This section is same as s. 7 of the Probate and Administration Act. An executor by implication is usually called executor according to the tenor.

Appointment by necessary implication.—"In order to constitute one an executor according to the tenor of a will, it must appear on a reasonable construction thereof that the testator intended that he should collect his assets, pay his debts and funeral expenses, and discharge the legacies contained in such will; in short, there must be words importing a general power to receive and pay what is due to and from the estate." (Walker and Elgood's Executors, p. 6.) "If by any word or circumlocution the testator recommend or commit to one or more the charge and office, or the rights which appearain to an executor, it amounts to as much as the ordaining or constituting him or them to be executors."—Hamabai v. Bamanji, 7 B. H. C., A. C., J. 64.

The word "necessary implication, means not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed." Wilkinson v. Adam, 1 Ves. and B. 466.

Illustrative cases.—(1) Where X was directed by the will to receive and pay the testator's debts and get in assets, he is an executor by implication: (Monahur Mukherjse, In re 5 C. 756.) Where a wife was appointed a shibait of the major portion of the property by a will she was held to be an executrix by implication. (Kribamoyee v. Mohum, 10 C. W. N. 232); See also the case of Nuthebai v. Canj, 26 B. 571 where the wife of the testator was held to be an executrix because the appoint ment was to the following effect, "bis affairs and distribution of money mentioned to be paid by my second wife Bai Nathibai."

Trustees.—"Merely to bequeath the whole personality to one upon a specific trust does not constitute him executor according to the tenor, nor does the appointment of a man as sole trustee, the only duties assigned to him being those of trustee."—Walker and Elgoods on Executor, p. 7; See also Appacooly v. Muthu, 30 M. 191).

Universal legatee.—An universal legatee is not an executor by tenor (Oliphant, in the goods of 1 Sev. & T. R. 525). But he is entitled to letters of administration with the copy of the will annexed.

#### Section 183.

Reference.—Vide s. 8 of the Probate and Administration Act, where the words "nor to a married woman without the previous consent of her husband" do not occur.

Minor.—There is no objection to a minor being appointed executor by the will. Even a child en ventre sa mere can be appointed an executor. But where he is a sole executor he cannot act as such and the Court grants administration with will an exed either to the guardian or to such other person as it may think fit during the minority of such infant, but where an infant is appointed executor with another who is capable of acting such other person is entitled to probate.—(Williams on Executors, 9th Ed., Vol. I., pp. 184-185.) Probate is granted to such an executor after he attains majority.

· Idiots and Lunatics.—" Idiots and lunatics are incapable of being executors or administrators; for these disabilities render them not only incapable of executing the trust reposed in them, but also, by their insanity and want of understanding, they are incapable of determining whether they will take upon them the execution thereof or not,"—Walker and Elgood on Executors, p. 10.

Married woman.—Under the Succession Act probate cannot be granted to a married woman without the previous consent of her husband. This was the law of England when the Succession Act (X. of 1865) was passed. But the Married Woman's Property Act, (1832) materially altered the law in this respect. Now "a married woman is capable of entering into any contract (which by s. 24 includes the office of executrix or administratrix), and of suing and being sued as if she were a feme sole, without her husband being made a party; and by s. 24, the provisions of the Act as to liabilities of married women extend to all her liabilities as trustee executrix or administratrix; and her husband is not liable unless he has acted or intermeddled in the trust or administration."—Walker and Elgood on Executors, p. 12.

Power of married woman under the Probate and Administration Act.—Under the Probate and Administration Act probate is granted to a married woman because the "imposition of a different condition would be inconsistent with the proprietary status accorded to married women among a large proportion of the persons for whom the Act is intended, and would confer a power on the husband which would, in many cases, be likely to be abused."—

Henderson's Law of Succession.

## Section 184.

Reference. - Vide s. 9 of the Probate and Administration Act.

Several executors.—" If there be several executors they are all regarded in the light of an individual person. Accordingly, probate granted to one of such executors enures to the benefit of all and it is not necessary for all to prove together, but one may even without notice to the others, prove the will. But the several executors must be of the same degree, i.e., of equal position. An executor for life is not of the same degree as the executor substituted upon his decease."—Mojumdar's Hindu Wills Act, p. 607.

Office survives on death of one of several executors.—Executors being in point of law but one person, the office of course continues, on the death of one of several executors, to the survivors or survivor, the executors of the deceased executor having in this case no interest.—Watker and Elgood on Executors, p. 21.

#### Section 185.

Reference-Vides, 10 of the Probate and Administration Act.

Note.—As a general rule probate is given of a will and a codicil at one and same time and not separately. But this section provides for the exceptional case when a codicil is discovered after the grant of the probate of the will. In such a case probate of the will is to be given separately.

Different executors.—If two or more papers are entitled to probate as containing the last will of the deceased, each person named executor in the several papers is entitled to probate, unless his appointment is any way repealed by a paper executed subsequently to that in which he is named. But the Court is always reluctant to exclude from probate executors whose appointment is revoked only by inference.—Tagore Law Lectures (1887), p. 321.

## Section 186.

Reference.—The same as s. 11 of the Probate and Administration Act.

Note.-Vide Note to s. 184 supra.

## Section 187.

Reference.-Vide s. 187 of the Hindu Wills Act.

Note.—If a will were made is a foreign country and proved there, disposing of personal property in England, it was necessary for the executor to prove it in England also.

#### Section 188.

Reference.-Vide s. 12 of the Probate and Administration Act.

Note.—"The effect of probate of a will is to declare the personto whom the probate is granted to be entitled to the powers of an executor whatever as such his powers may be" because "probate cannot confer upon the executor any legal character." (Grish v. Broughton, 14 C. 875.) In this section it is said that "the effect of probate of a will when granted is to establish the will from the death of the testator and to render valid all intermediate acts of the executor as such, but although probate establishes the will as from the testator's death, it is merely operative as the authenticated evidence, and not at all as the foundation of the executor's title; for he derives all his title from the will itself, and the property of the deceased vests in him from the testator's death. A grant of probate or of administration is in the nature of a decree in rem, and actually invests the executor or administrator with the character which it declares to belong to him. Accordingly, a grant of probate is conclusive against all the world."-Tayore Law Lectures (1887), p. 324. So the words "establishes the will from the death of the testator," mean "is conclusive proof of the genuineness of the will, and of the date of the testator's death;" and the words "renders vatid, etc." mean, "proves to have been valid ab initio."-Vide Masumdar's Hindu Wills Act, p. 613.

Effect of Probate.—When the probate is granted it operates upon the whole estate, and by this section it establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such. The property vests in the executor by virtue of the will, not of the probate. The will gives the property to the executor; the grant of probate is the method which the law specially provides for establishing the will. So long as the probate exists it is effectual for that purpose.—Komol Lochun v. Nilruttun, 4 C. 360.

## Section 189.

Reference.—Vide s. 13 of the Probate and Administration Act.
Note.—Vide Notes under s. 8.

### Section 190.

Note,—This section has not been incorporated in the Probate and Administration Act and as such is not applicable to persons who are exempt from the Succession Act.

### Section 191.

Note.-This is s. 14 of the Propate and Administration Act.

#### Section 192.

Note.—The authority of the testator dates from the date of the grant of letters of administration. But the authority of the executor dates back from the death of the testator. So "an act done by a party who afterwards becomes administrator to the prejudice of the estate, is not made good by subsequent administration. It is only in those cases where the act is for the benefit of the estate that the relation back exists, by virtue of which the administrator is enabled to recover against such persons as have interferred with the estate, and thereby to prevent it from being prejudiced and despoiled."—Morgan v. Thomas, 8 Exch. 307; see also 34 M. 395.

#### Section 193.

Reference.-Vide's. 16 of the Probate and Administration Act.

Principle.—"According to what is called the doctrine of priority, the claim of any person having superior interest is preferable to that of one having an inferior interest to take administration with or without will annexed all persons having priority must have first renounced or waived their rights or having been cited must have neglected, by their non-appearance to avail themselves of such rights."—Vide Mosumdar's Hindu Wills Act, p. 625. "If an executor fails to accept the office within the time limited by a citation calling upon him to accept or renounce the executorship, or if he renounce, the will may be proved and letters of administration with a copy of the will annexed may be granted to the person who would be entitled to administration in case of intestacy."—Tagore Law Lectures (1887), p. 327.

## Section 194.

Reference.—The same as s. 17 of the Probate and Administration Act.

Renunciation.—An executor can renounce the executorship if he so desires. Such renunciations are of every day occurrence. But when an executor does acts which amount to an administration, i. e., when anything is done by him with relation to the effects of the testator which shows an intention in him to take upon him the executorship then it is too late for him to renounce. He may then be cited to take probate and his disobedience will be a contempt of Court. An executor cannot also renounce after the grant of probate to him.

Partial renunciation.—An executor cannot accept in part and refuse in part.

Requisites of a binding renunciation.—Renunciation need not be under seal, a parol one being sufficient, though it has been said that an informal declining by letter to take the office of executor is insufficient. It is enough that the instrument of renunciation states in substance, though not in terms that the party has not intermeddled.—Walker and Elgood on Executors, p. 18.

#### Section 195.

Note. - Cf. s. 18 of the Probate and Administration Act.

Letters of administration.—Administration may be granted either with the will annexed or without it as in the case of intestacy. In latter case as to the persons who are entitled to it and the order in which they are so entitled, see ss. 200-206 infra.

Within the time limited for the acceptance.—If the executor delay exercising his option, he may be cited to accept or refuse probate. The time which the party is allowed for deliberation as to whether he will accept the trust or not, or, in other words, which must elapse before the issuing of the citation to accept or refuse, is uncertain or in the discretion of the Judge. Much of course, depends upon the nature of the estate to be administered.—(Walker and Elgodo on Executors, p. 18.) Where a citation has been issued by the Court calling upon the executor either to renounce or accept the executorship, he must accept within the time allowed by Court.—Motibai v. Karsondas, 19 B. 123.

#### Section 196.

Note. - Cf. s. 19 of the Probate and Administration Act.

Residuary legatee.—"The prevailing reason for the preference of the residuary legatee may be, that the residuary legatee stands in loso haeredis, for though he has not the official powers of the haeres, they having been transferred to the executor, he has his beneficial interest in the estate. Another reason is given by Sir J. Nicholl, who observes:—The residuary legatee is the testator's choice; he is the next person in his election to the executors. Inasmuch, too, as his bequest can have no realization until all the debts and all the other legacies have been paid, he is influenced above all other legatees, if honestly inclined, in effecting a faithful and complete administration of the estate. (Repington v. Holland, 2 Lee 256; Coote's Prob. Prac. 65)."—Henderson's Law of Succession.

Several residuary legatees.—" If there be several residuary legatees, any may take out the administration without the consent of, or notice to, the other (Coote's Probate Practice.) If the residuary estate be given to one for life and afterwards to another, the residuary legatee for life is entitled to the grant in preference to the residuary legatee substituted at his death; but if he die or renounce, or being cited, refuses, by non-appearance to the process, the grant will be made to the substituted residuary legatee."—Brown v. Nicholls, 2 Robb. 399. A residuary legatee who is next of kin, is to be preferred to other residuary legatee.

Death of executor.—If an executor dies leaving a will and after proving the will of the testator, in England the executor of the

executor represents the first testator, without any administration debonis non. It is necessary, however, that the first executor should have proved his testator's will; for, if he die before probate, his executor is not executor to the first testator. But in India the law is quite different. In such a case letters of administration with the will annexed is granted to the universal legatee.

#### Section 197.

Note.-Cf. s. 20 of the Probate and Administration Act.

Residuary legatee.—A residuary legatee may have beneficial interest in the estate or he may be a trustee. When letters of administration with the will annexed is granted to him as a trustee of the residuary estate, in that case after his death the person or persons having the beneficial interest in the residue are entitled to letters of administration in preference to his representatives. (Hutchison v. Lambert, 3 Add. 27.) But where the residuary legatee had beneficial interest in the estate in such a case administration cum testaments annexo shall be granted to his personal representative and not to the next of kin of the testator.—Isted v. Stanley, Dyer 272.

#### Section 198.

Note. - Cf. s. 21 of the Probate and Administration Act.

Priority.—In granting letters of administration it is the duty of Court to consider which of the claimants has the greatest interest in he effects of the deceased, the governing principle being that he who has the greatest beneficial interest must have preference. Generally, failing the residuary legatee, administration is granted to the next of kin. If the next of kin decline it, it may be granted to a legatee or a creditor, though the grant is not as of right, or, if the legatee be bankrupt, to the trustee under his bankruptcy.—Walker and Elgood on Executors, p. 67.

### Section 199.

Note. - Vide s. 22 of the Probate and Administration Act.

Citation —The general principle of citation is that a person having a prior claim must be cited before the grant of letters of administration to any other person. "Therefore the executor if there be one, must be cited before a grant to a residuary legatee, a cesiduary legatee before a grant to a specific legatee, and so on, through all the gradations of priority," As administration is generally granted to the next of kin failing the residuary legatee, so it is desirable that a citation should be issued on him in case any legatee other than the residuary legatee applies for letters of administration.

Next of kin.—" Next of kin is sometimes construed to mean next of blood, or nearest of blood, and sometimes only those who are entitled to take under the statute of distribution, and sometimes to include other persons." Probably it means nearest of blood. It includes a widower or a widow of a deceased person, or any other person, who, by law and according to the practice of Courts, would be entitled to letters of administration in preference to a creditor or legatee of the deceased.—Administrator-General's Act.

#### Section 200.

Note.—Ss. 200-207 have not been included in the Probate and Administration Act.

#### Section 201.

Note.—The next of kin has by law the same title to administration as the widow has, but the practice is to make the grant to the widow, unless some objection exists against her. (Stretch v. Pyme, 1 Lee, 30.) However, the grant to her is discretionary, and the Court will, on sufficient cause shown, exercise its discretionary power, and grant administration to the next of kin in preference to the widow.—Walker and Elgood on Executors, pp. 46-47.

#### Section 202.

Note.—The Court may grant administration to the widow and one of the next of kin, though in consequence of its preference of a sole to a joint administration, it is not the practice to do so, unless all the other next of kin are adult, or at least not of tender years and consent.—Ibid, p. 47.

#### Section 203.

Note.—According to the law of England the following is the order in which the next of kin stand in respect of their right to, obtain administration:—(1) husband or wife, (2) child or children, (3) grandchild or grandchildren, (4) great-grandchild or great-grandchildren, (5) father, (6) mother, (7) brothers and sisters, (8) grandchildrens or grandmothers, (9) nephew and niece, uncles, aunts, great-grandfathers or great-grandmothers, (10) great-nephews, great-nieces, etc., all being equally entitled who stand in the same degree.

Mother.—So long relations 1-5 are in existence the mother is not an heir so she is not entitled to letters of administration.—

Succession Act, 9. 36.

### Section 204.

Note.—Where two or more in equal degree are contending, the constant rule is to grant administration to the greatest interest, at least where there is no material objection on the one hand, or reasons for preference on the other.

## Section 205.

Note.—As a general rule, on the death of a wife intestate, her husband has a right to administer her estate, exclusive of all other persons, there being no power or election to grant administration to any one else. But the Court will pass him by in granting administration to a woman whose marriage has been dissolved by reason of her husband's a dultery and desertion. Again, administration of the wife's effects hes been refused to the husband on the ground that the marriage was in fact void.—Walker and Elgood on Executors, p. 43.

## Section 206.

Greditor.—Administration is only granted to a creditor, failing any other representative.

## PART XXX.

### Section 208.

Note. - Vide s. 24 of the Probate and Administration Act.

Since the Testator's death —A Will may be destroyed before the death of the testator or after his death. If it is lost or destroyed during the life time of the testator the presumption is that it was destroyed by him:

Lost will.—Administration will be limited till a fost will should be found.

Procedure,—In such a case the testator must prove:—(1) The existence of such a will after the death of the testator; (2) The due execution of the original will, and (3) The copy is a true copy.

## Section 209.

Note,-Vide s. 25 of the Probate and Administration Act.

Procedure,—The following conditions are to be fulfilled for proving the contents of the lost will:—(r) It must be proved by at least one witness; (s) It must be proved that it was in existence at the time of the testator's death; (s) It must be proved that the original will was duly executed.

## Section 210.

Note .- Vide s. 16 of the Probate and Administration Act.

### Section 211.

Note .- Vide s. 27 of the Probate and Administration Act.

#### Section 212.

Note.—Cf. s. 28 of the Probate and Administration Act. Here the administration is granted to an agent of the executor because the executor is absent and the letters of administration must be granted to some one for the proper administration of the estate of the deceased.

#### Section 218.

Note.—Vide s. 29 of the Probate and Administration Act. Section 214.

Note. - Vide s. 30 of the Probate and Administration Act.

#### Section 215.

Note .- Vide s. 31 of the Probate and Administration Act.

Note.—If one dies intestate, and the right of administration devolves upon an infant, the Court is to grant administration during the minority of the infant till he arrives at the age of twenty-one, because an infant cannot before his full age, by the common law, give bond to administer faithfully. The same is the case where an infant is sole executor. The reason of the Court having a power, to grant administration Durante minore actate of an executor is because there is no person capable of suing or recovering the debts of the deceased. (Walker v. Wollaston 2 P. Wms. 589.) A grant under this section ceases as soon as the minor attains majority (Sevnarain Mohata, 21 C. 911.) But letters of administration under this section cannot be granted to Court of Wards on behalf of a minor. —Ganjessar v. Collector of Patna, 25 C. 795.

## Section 216.

Note.—Vide s. 32 of the Probate and Administration Act. Here administration during minority of two more executors determines when one of them comes of age.—Jones v. Earl of Strafford, 3 P. Wms. 89.

## Section 217.

Note. - Vide s. 33 of the Probate and Administration Act.

### Section 218.

Note.—Vide s. 34 of the Probate and Administration Act. The reason for administration durante minore aetate has been mentioned in notes under s. 215; pendente lite, there being no executor that can sue, such case is within the same mischief. The Court can appoint an administrator pendente lite even at the instance

of a creditor who is not a party to the suit for his protection. The Court will not appoint an administrator pendente lite, where the litigation, though affecting the validity of part of the will, does not so not appointment of executors, because such an administrator is only appointed in order that he may discharge certain necessary functions which there is no body else to discharge.

The duties of such an administrator commence from the date of the order of appointment, and terminate when the list comes to an end, and a decree is made in favour of a will with executors. If the deceee is appealed from, his duties will not cease till the disposal of the appeal.

#### Section 219.

Note. - Cf. s. 35 of the Probate and Administration Act.

#### Section 220.

Note. - Cf. s. 36 of the Probate and Administration Act.

#### Section 221.

Note.—Cf. s. 37 of the Probate and Administration Act. This section applies only to property, in which a deceased person had ownership, so as to constitute it a portion of the estate, although he held it in trust.

## Section 222.

Note,—Cf. s. 38 of the Probate and Administration Act. In England such an administration is granted to the nominee of a plaintiff who is about to commence proceedings. Under a grant of this kind the grantee has only authority to carry on the suit and a decree made against him is binding against the estate of the deceased.

## Section 223.

Note -Cf. s. 39 of the Probate and Admisistration Act.

## Section 2.4.

Note,-Cf. s. 40 of the Probate and Administration Act.

## Section 225.

Note — Cf. s. 41 of the Probate and Administration Act. According to the English practice a general statement made upon affidavit that it is necessary for the preservation of the personal estate and effects of the deceased, that administration should be granted, will not be sufficient to justify a grant. The Court must be satisfied that it is necessary and convenient that the grant should be made, and

unless there are special circumstances to justify it no grant can be made. Thus, in the goods of white (2 Sev. and Fr. 457), the persons entitled to administration could not be communicated with by reason of the blockade of the post of the Southern States, but the Court refused to grant administration to another as the property was not perishable.—Vide Tagore Law Lectures, p. 342.

#### Section 226.

Note. - Cf. s. 42 of the Probate and Administration Act.

Note .- "Under certain circumstances the Court may admit portion of a will only to probate, as where a particular clause has been inserted by fraud in the will of the testator during his lifetime, or by forgery after his death, or if it appears that the testator had been induced by fraud to make it part of his will. In such cases probate, or letters of administration with the will annexed is granted excepting the particular clause. So where words or clauses have been introduced into a will by mistake or accident, without the knowledge of the testator, the Court may admit the will to probate omitting such words or clauses." (Tagore Low Lectures 1887, p. 342.) But Mr. Mozumdar thinks that that is not the scope of the section. He thinks that the section is applicable in case where the testator appoints one executor for a special purpose or a specific fund only, and another executor for all other purposes in which case the latter may take probate except that purpose or fund. - See Mozumdar's Hindu Wills Act, p. 680.

### Section 227.

Note.—Cf. s. 43 of the Probate and Administration Act. This section is like the preceding one. But it is applicable in cases of intestacy whereas the s. 226 is applicable in cases of testamentary succession.

### Section 228.

Note. - Cr. s. 44 of the Probate and Administration Act.

Note.—A grant of the rest, or a grant caeterorum as it is technically denominated, is a grant of probate or administration following upon a limited grant. It is made under the same conditions as a grant with exception. This, if a testator has appointed one executor for a specific purpose or a specific fund, together with another executor for all other purposes and effects, and the first mentioned executor has taken his limited probate the other may take probate of the rest of the testator's effects.—Coote's Prob. Prac. 162. Vide Henderson's Law of Succession).

## Section 229.

Note .- Cr. s. 45 of the Probate and Administration Act.

### Section 230.

Note.-Cf. s. 46 of the Probate and Administration Act.

Note.—The grant of administration de bonis non is in the discretion of the Court, but it is usually made to follow the interest. In this section it is clearly stated that the grant is to be made in accordance with the rules as apyly to original grant for this—Vide s. 196 supra.

### Section 231.

Note.—"This section has been incorporated as s. 47 of the Probate and Administration Act, V. of 1881. It relates to supplemental, or as they are also technically called cessate, grants. This form of grant, although only required where deceased's estate has not been fully administered, is distinguished from a grant de banis non as being a re-grant of the whole of the deceased's estate just as it was sworn to and embraced by the original grant. Accordingly, the estate, on the second grant being applied for, must be sworn under the same amount as that for which the original grant was taken, though a part of the estate may actually have been disposed of by the first grantee (Abbott v. Abott, 2 Phill. 578)."—Henderson's Law of Succession.

## Section 232.

Note. - Cf. s. 48 of the Probate and Administration Act.

Note.—Three classes of errors are contemplated by this section (1) errors of names and descriptions, (2) errors regarding time and place of the death of the deceased, and (3) errors regarding purpose in a limited grant.

## Section 233.

Note.--Cr. s. 49 of the Probate and Administration Act.

Note.—If a codicil be found after probate of a will has been granted, a separate probate is granted of that codicil, and the first undergoes no alteration or amendment. If, however, the appointment of the executors under the will is annulled or varied by the codicil, the probate must be brought in and revoked, and probate will be granted anew of the will and codicil. Should an unattested or unexecuted paper incorporated by the testator in his will have been omitted from probate, it may be amended by engrossing the former into it.—Coote's Prob. Prac., pp. 255-256.

#### Section 234.

Eote. - Cf. s. 50 of the Probate and Administration Act.

Note.—"The Court," says Mr. Coote, "as having the fullest authority on the subject, is not necessarily or absolutely functa officio after a grant has been made. For the Court possesses and exercises, when it becomes necessary, the power of revoking or annulling for just cause any grants which it has made; and in so doing, it only or inaccurate suggestions."—Coote's Probate Practice 197.

Precedure for obtaining revocation .- "The probate can be revoked upon any of the grounds mentioned in this section. The duty of the Judge, upon an application being made under this section, somewhat depends upon what has passed on the previous grant of probate. Clearly, however, the first thing for him to do is to direct notice to be given to the executor and all persons interested under the will or claiming to have any interest in the estate of the deceased. It is also clear from s. 26, that the executor will be the plaintiff in the regular suit, which the Judge will then have to try. And the object of this is clear. It is in order to enable the Judge, if he thinks proper to call upon the executor to prove the will again in the presence of the objector notwithstanding the prior probate, just as in England he may be called upon to prove the will in solemn form. But a discretion is left to the Judge. Where there has been already full enquiry as to genuineness of the will, the Judge would probably take, as he would have a right to take, the previous grant of probate as prima facie evidence of the will and so shift the onus on the objector. But if there had been no previous contention, and the will had only been proved summarily, or in what is called common form in England, that is, without any opposition and merely ex parte to the satisfaction of the Judge who can know nothing of the circumstances or the state of the family, then he ought in all such cases, to have the will regularly proved afresh, so as to give the objector an opportunity of testing the evidence in support of the will being called upon to produce his evidence to impeach it."-Komul Lochun v. Nilratun, 4 C. L. R. 175 (179).

Probate when irrevocable.—"Probate granted in solemn from is irrevocable, (a) where all the parties adversely affected by it have been parties or privies to the proceeding in which it was granted; (b) where such proceeding was quite legal and fair—free ir m anything fraudulent or collusive; and (e) where there is no later will?"—Mozumdar's Hindu Wills Act, 701.

Just Gause.—The explanation of the term "just" cause is exhaustive. So a probate cannot be revoked is any other cause. A probate cannot be revoked for mismanagement or mal-administration by the executor (Annada v. Kalli, 24 C. 95; Gour v. Sarat, 40 C. 50). Nor it can be revoked for the incompetency of the executor. In

such a case the remedy of a person lies lin an administration suit before a Civil Court.

Fraud.—As it is incident to every Court to rectify mistakes it was led into by the misrepresentation of parties, so fraud is cause of reversal of a probate, if there be falsehood in the proof, were it communiforma, or by examination of witnesses.

Useless and inoperative.—A probate generally becomes useless and inoperative by the discovery of a second will of a later date or a codicil the direction given in which is contrary to the provision of the will.

Account and Inventory.—Wilful comission to submit an account is a just cause for revoking the probate. A simple omission is not. A mere filing of an incorrect inventory will not be a ground of revoking a probate it must be incorrect as regards material points.—Gokuldas v. Purshottam, 4 Bom. L. R. 979; Premchand v. Surendra, 9 C. W. N. 190.

Who can apply for revocation.—The general rule as to who can apply for revocation is that he can oppose the grant or can enter caveat can apply for revocation (Nobia v. Bhaba, 6 C. 460: Kamona v Hurro, & C. 570). So he who has a sufficient interest in the property to maintain a suit in respect thereof, is entitled to maintain a case for the revocation of the probate (Ibid). "Any interest, however slight, and even, it seems, the bare possibility of an interest is sufficient to entitle a party to oppose a testamentary paper." (Rahamtulla v. Ram, 17 M. 373.) A person who claims adversely to the testator cannot be said to have any interest in the property of the deceased and as such he has no locus standi either to opposite the grant or to claim for revocation (Abhiram v. Gopal, 17 C. 48; Srigobind v. Laljhari, 14 C. W. N. 119). A presumptive riversioner has a sufficient interest for the purpose of locus standi (Brindaban v. Sureswar, 10 C. L. J. 263). So also a creditor of a son of the testator is entitled to apply for revocation. Lakhi v. Mutan, 16 C. W. N. 1000.

A creditor of the testator has no locus standi to opposite the grant but an attaching creditor or a mortgagee has (17 M. 373; 10 C. 413)

Effect of revocation.—All bond fide payments to executors or administrators are good discharges to the parties making them, though the probate or administration should be afterwards revoked. Executors or administrators who have acted under any such revoked instrument may reimburse themselves in respect of any proper payments they have made.

## PART XXXI.

#### Section 236.

Vide s, 53 of the Probate and Administration Act.

Note.—"The Court of Probate shall have the like powers, jurisdiction, and authority for enforcing the attendance of persons required by it as aforesaid, and for punishing persons failing, neglecting, or refusing to produce deeds, evidences, or writings, or refusing to appear or to be sword, or guilty of contempt, and, generally for enforcing all orders, decrees, and judgments made or given by Court under this Act and otherwise in relation to the matters to be inquired into and done under this Act, as are by law invested in the High Court of the chancery for such purposes in relation to any suit or matter depending in such Court."—English Probate Act, s. 25.

#### Section 237.

Note.—This is same as section 54 of the Probate and Administration Act. Vide also section 77 of the English Probate Act.—In re Newton, 8 B. L. R. Ap. 76, (it was held that the exemplication of a will was an instrument within this section which the Court could order to be produced).

## Section 238.

Note.—This is section 55 of the Probate and Administration Act. This section must be read with sections 236 and 261 of the Indian Succession Act. So far as procedure and practice are concerned all probate proceedings shall, except in certain cases, be regulated by the Code of Civil Procedure. As regards exceptions vide ss. 240, 241, 247, 248 and 250, of the Indian Succession Act. Not only in contentions cases the procedure is regulated by the Code of Civil Procedure.—Pakrain v. Innast. 19 M. 458), but the Civil Procedure Code also governs non-contentious cases so far as it can be made applicable (Dinatarini Debi, 8 C. 880). This section is also applicable to a case of revocation of probate.—Pratap v. Kali, 4 C. W. N. 600.

Limitation.—Limitation Act is not applicable in cases of applications for probate or letters of administration.—Gnanamuthu v. Vanakoil, 17 M. 379; see also 6 C. 707; 10 A. 350.

Arbitration.—The fact as to whether a will was duly executed or not cannot be decided by arbitration.—In re Nesbitt, 4 B. L. R., App. 49.

## Section 240.

Note.—This is section 56 of the Probate and Administration Act. In order to give jurisdiction to a Court under this section the

deceased must have either a fixed place of abode or property within the District—(Furdunji v. Navajbai, 17 B. 689). Under this section a District Judge is competent to grant probate of a will executed out of British India by a person not a British subject if the testator had, at the time of his death, moveable or immoveable property within jurisdiction of Judge.—Bhanrao v. Lakshmibai, 20 B. 607; Golam v. Saboo, 20 W. R. 286.

#### Section 241.

Note.—This is same as section 57 of the Probate and Administration Act. The discretion given under this section to a Judge to refuse application is limited only in cases where there is a Court of concurrent jurisdiction in British India to which the applicant can apply for probate.—Vide Bhanrao Lakshmibai, 20 B. 607.

#### Section 241A.

Note.—The jurisdiction of the District Delegate is determined by the fixed place of abode of the deceased at the time of death. These Delegates have nothing to do with the existence or non-existence of any property of the deceased within his jurisdiction. Where the deceased died outside the jurisdiction of District Delegate but leaving property under his jurisdiction in such a case an application for probate or letters of administration should be entertained by the District Judge subject to the provision of section 241, supra.

## Section 242.

Note.—This is section 59 of the Probate and Administration Act.

## Section 243.

Note.—This is section 61 of the Probate and Administration Act.

Object.—"This section as well as sections 244 and 246 are enacted for the purpose of authorizing the grant of administration and rendering it conclusive even though there might be incorrect statements or omissions in the application upon which the grant is issued, and have no reference to the valuation of the estate for the purpose of levying a Court-fee upon it. These are enacted for jurisdictional and are not for fiscal purpose,"—In the goods of Sir. A. A. D. Sasson, 21 C. 673.

## Section 244.

Note.—This is section 62 of the Probate and Administration Act.

## Section 245.

Note. This is section 63 of the Probate and Administration Act.

#### Section 246.

Note.—This is section 64 of the Probate and Administration Act.

Section 250.

Note. This is section 69 of the Probate and Administration Act.

Probate in common and solemn form. - In probate of will there is one form, which is slight and summary, for ordinary and undisputed cases, and another more formal, by solemn decree of Court. A testament may be proved either in common form, as when the executor, presenting the testament before the Judge, without citing the interested, doth depose the same to be true, whole, and last will and testament of the deceased, and whereupon the Judge doth annex his probate and seal thereunto, or in form of law (more commonly called a solemn form, or per testes), as when the widow or next of kin to the deceased are cited to be present, in whose presence the will is exhibited before the Judge, whereupon, witnesses being produced, received, sworn, eximined, and their depositions published, the Judge, in case of sufficent proof, doth pronounce, for the validity of the testament. A will being proved in form of law, the executor is not compellable to prove it any more; but he that proves in common form may be compelled to prove the same again in form of law,"-Walker, and E good on Executors, p. 32. See also Komallochun v. Nilratan, 4 C. 300.

Gitation.—Citation is general or special. A citation is general when it calls all the parties interested in the proof of the will. A citation is special when it is issued especially on a particular person to come and see the proceedings. The chief object of citation is to compel all persons having right to grant or oppose it to come in or else to lose their right in favour of the applicant.

## Section 251.

Note,—This is section 70 of the Probate and Administra-

Caveat. "" A caveat is a warning or caution in writing entered in the Court of Probate, ' to stop probate and administrations from being granted without the knowledge of the party that enters it "—(Mojumdar's Hindu Wills Act; p. 769). The stamp duty on a caveat is Rs. 5 (Court Fees Act, Schedule II., Art. 12). A caveat may be entered for the purpose of disputing a will as for the purpose of supporting a will:—[Vide Chotalal v. Bai Kabubai, 22 B. 261: Fueram v. Strong, (1815) 2 Phill. 315.]

## Section 252.

Note. This is section 71 of the Probate and Administration Act,

#### Section 254.

Note.—This is section 76 of the Probate and Administration Act.

Should be granted.—Where the genuineness of the will is not disputed and the applicant is not legally incompetent, the Court has no discretion to refuse the grant of probate.—Hara Coomar v. Doorga Dasi, 21 C. 196.

#### Section 256.

Note.—This is section 78 of the Probate and Administration Act. Under this section the Court must take administration bond in cases of letters of Administration: In cases of grant of probate to an executor security bond is not generally necessary (Giribala v. Bijoy, 31 C. 188). This bond is taken for duly collecting, getting in, and administering the estate of the deceased. Where there has been an Administration Durante Minore Estate, and the minor on comming of age takes the Administration upon himself, he is obliged to give security to the same amount as the Administrator in the first instance.

#### Section 257.

Note: - This is section 79 of the Prabate and Administration Act.

Assignment of bond.—The Court may, on being satisfied that the condition of any Administration bond has been broken, order an assignment of the same to some person to be named, and such person his executors and Administrators, shall be entitled to sue and recover on such bond as trustee for all persons interested.

The Court will grant a rule nisi for an assignment, if the application be bond fide, and a prima facie case be made out of a breach of the condition; but may refuse to assign on a frivolous or vexatious ground, and, even where it grants an application, may put the application upon terms.—Walker and Elgood on Executors, p. 102.

Breach of the conditions.—The following are instances of breach:—(1) Conversion of the effects to administrator's own use, whereby they are lost to the estate (Archbishop of Canterbury v. Robertson, 1 Cr. & M. 690); (2) Failure to exhibit inventory (Lachman v. Chater, 10 A. 29); (3) Payment of a legacy beque eathed to an infant, or to a person who afterwards absconds.—[Dobbs v. Brain (1892), 2 Q. B. 207.]

Proper person.—A creditor of the deceased is a proper person and the Administrator-General is also a proper person.—Vide to A. 29; 3 C. L. J. 422; 8 C. L. J. 94.

## Section 261.

Note.—This is section 83 of the Probate and Administration Act.

Suit.—In a probate proceeding, the party who is asking some relief is considered as plaintiff and any one who has been served a notice would be considered as defendant.

#### Section 262.

Note.—This is section 84 of the Probate and Administration Act.

Principle. Every person is bound to pay a deference to a judicial act of a Court having competent jurisdiction, and to give credit to a probate until it is vacated (Allen v. Dundas, 3 T. R. 125). If there be a rightful executor and he does not come forward, he is guilty of latches. Suppose such a one were to lie by for a number of years, and in the meantime all the debts were to be collected by another person, who had obtained a probate as executor, those payments ought to be protected; for during all that time the debtors could not controvert his authority, and it is admitted that, if actions had been brought in such cases, the debtors could not have made any defence. Consistently with these doctrines, payment of money to an exocutor who has obtained probate of a forged will is a discharge to the debtor, notwithstanding the probate be afterwards declared null, and payment to an administrator regularly appointed exonerates the debtor, though it should turn out there is a will existing. - Walker and Elgood on Exectors, p. 112; See also Ambica v. Kala, 10 C. W. N. 422.

#### Section 263.

Note,—This is section 86 of the Probate and Administration Act.

Appeal.—Appeal shall lie from every order made by a District Judge or District Delegate under the rules contained in the Code of Civil Procedure applicable to appeals. So also "an appeal shall also lie from every order passed by a Probate Court, purporting to act under this Act, although there is nothing in the Act, authorizing such act (Narain v. Saudamini 11 C. W. N. 211)."—Mosumdar's Hindu Wills Act, p. 800.

But the words "Every order made by a District Judge" are evidently controlled by the concluding words "under rules contained in the Code of Civil Procedure."—Brojo v. Dasmony, 2 C. L. R. 589.

## Section 264.

Note.—This is section 87 of the Probate and Administration Act.
The High Court in its original side has concurrent jurisdiction.

## Section 265.

Executor de son tort.—"An executor de son tort, or of his own wrong, is one who takes upon himself the office of an executor

by intrusion not being so constituted by the testator or deceased, nor, for want of such constitution, substituted by the Court to administer. The term is used indifferently of those who so intrude themselves into the affairs whether of testates or intestates. Indeed, there cannot be an administrator de son tort; the law knows no such appellation.

"An executor acting before probate has been called an executor de son tort; but this must not be understood as meaning that such a person is a wrong-doer. Indeed the expression is used in such a connection, is altogether inaccurate. Such a one is not, nor was he ever an executor de son tort, for he derives an inchoa te right from the will."—Walker and Elgood on Executors, pp. 335-336.

What constitutes a wan an executor de son tort.—It has been said to be clear from all the cases that the slightest circumstance will make a man executor de son tort, as where a man received a debt due to the deceased, where a widow took more paraphernalia than she was strictly entitled to, where one took possession of the deceased's dog, or even millked his cows, or took possession of his bedstead or Bible.—Ibid p. 336.

Exceptions.—But "merely doing acts of necessity or humanity, as locking up the goods, or burying corpse of the deceased, will not amount to such an intermeddling as to charge a man as executor of his own wrong. As to the funeral of the deceased, giving direction for it does not make a man executor of his own wrong, nor does the receipt of a debt due to the estate of the deceased for the purpose of paying for the funeral expenses, unless a man receive a greater sum than is reasonable for that purpose, regard being had to the estate and condition of the deceased,"—Ibid, pp. 336-37.

#### Section 266.

Note.—It has been said that an executor de son tort is not in any event liable for more than the assets which have come to his hands, but he may be answerable for the acts of another person when such acts have been authorized and directed by him.—(Kenny v. Ryan, 1 Ir. Rep. 513). When one who has been named executor and has intermeddled can be compelled to take probate.

## PART XXXIII.

#### Section 267.

Note.—'This is section 88 of the Probate and Administration Act. An executor is entitled to sue on those causes of action which survive the testator. By the English law "all personalities and rights to personalities are given to the executors or administrators, as all realities or right to realities are given to the heir. But by the common law, if an injury were done either to the person or the property of another, for which damages only could be recovered in satisfaction, the action died with the person to or by whom the wrong was done." But "it never was extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any other duty to be performed; for there the action survived."—Walker and Elgood on Executors, p. 131.

#### Section 268.

Note.—This is section 89 of the Probate and Administration Act.

What rights and liabilities survive .- "An executor or administrator so completely represents or stands in the place of the testator or intestate, with respect to the rights and liabilities of the deceased, that all rights of action founded upon 'any obligation, contract, debt, covenant or other duty,' which the testator or intestate might have sued or been sued upon, survive his death and devolve upon his executor or administrator. That is to say, an executor or administrator is answerable as far as, there are assets, for debts of any description due from the deceased, either debts, or recorder debts, due on special contract, as for rent or on bonds, covenants and the like under seal; or debts on simple contract as notes unsealed and promises not in writing either expressed, or implied. And as regards promises and contracts of the deceased, the rights and liabilities of the executors or administrators arise even if they are not named in any terms embodied in them: 'for the executor or administrators of every person are implied in himself." -- Mosumdar's Hindu Wills Act. р. 80б.

#### Section 269

Note.—The general rule both of law and equity is clear, that an executor may dispose of the testator, that over them he has absolute power, and that they cannot be followed by the testators creditors. It would be monstrous if it would be otherwise, for then no one could deal with an executor. He must sell, in order to effect the will; but who would buy, if liable to be called to an account? (Whale v. Botu, 4 T. R. 625.) "It is this absolute power which has been conferred by the Legislature upon executors or administrators under the Indian Succession Act; and so far as moveable property is concerned, it seems, the same power has been given to them by the Probate and Administration Act. S. 90, as it originally stood, by the words 'with the consent of the Court,' restricted the power of executors and administrators, both as regards moveable and immoveable property. But by the present section, this restriction has been removed in respect to the disposal of moveable property. It has relation, now, it seems, only to immoveable property."-Mozumdar's Hindu Wills Act, p. 832).

#### Section 270.

Note.-This section has been incorporated as s. 91 of the Probate and Administration Act. According to English law, an executor shall not be permitted either immediately, or by means of trustees, to be the purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost advantage made by him of the subject of purchase (Hall v. Hallett, I Cox 134). One of the most firmly established rules is that persons dealing as trustees and executors must put their own interest entirely out of the question, and this is so difficult a thing to do in a transaction in which they are dealing with themselves that the Court will not inquire whether it has been done or not, but at once says that such a transaction cannot stand. To set aside a purchase by a trustee of the trust property, it is not necessary to show that he has made an advantage. The executor who has renounced, or, though he has not renounced, has never proved or acted, may purchase the assets, but in the latter case, if he used his power in such a way as to make it inequitable that he should purchase, the sale would not be up held .- Walker and Elgood on Executors, p. 166.

## Section 271.

Note.—This is section 92 of the Probate and Administration Act. Co-executors, however numerous, are regarded in law as an individual person, and by corsequence the acts of any one of them in respect of the administration of the effects, are deemed to be the acts of all, for they have all a joint and entire authority over the whole property.

Illustration (f) to this section may be taken as an illustration of a direction to the contrary, controlling the operation of the section. As pointed out by Mr. Stokes in his edition of the Succession Act, p. 173, the section taken with this illustration will render it unsafe for any one to deal with a single executor, unless he sees the probate and ascertain either that no other executors were appointed by the testator, or that, the will contained on such direction as that mentioned in the illustration.—Henderson's Law of Succession, p. 280.

## Section 275.

Note.—This is section 96 of the Probate and Administration Act.—Vide Ss. 183 and 189 supra.

# PART XXXIV.

Section 276.

Note.—This is section 97 of the Probate and Administration Act with slight modification.

## Section 277.

Account.—Held, that the words "or within such further time as the Court may from time to time appoint, etc.," mean that one account is to be exhibited and not a series of accounts from time to time, the words "from time to time appoint" relating to an extension of the period within which an account is to be exhibited (Mahesh v. Bisva, 23 C. 250). But a mere omission to file an inventory or an account is not a ground of revocation.—Bal Gangadhar v. Sakwarbai, 26 B. 792.

# Section 282.

Note.—This is section 104 of the Probate and Administration Act. Here the knowledge must be actual and not constructive.—Asiatic Banking v. Amador, 8 B. 20.

# PART XXXV.

## Section 292.

Note.—This is section 112 of the Probate and Administration Act. After the probate of the will the whole estate vests in the executor and it is his duty to apply it in the first place for paying the funeral expenses and death-bed charges; then testamentary or executorship charges are to be met; next the wages of the servants are to be paid; after that it must be applied in payment of debts; lastly the legacies are to be paid. But if the asset be not sufficient to pay all the legacies in that case there are to be paid in certain orders. For the above distributions an executor is liable. Hence the law imposes the necessity that every legatee, whether general or specific must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect.—Vide Williams on executor, p. 1125.

## PART XXXVII.

# Section 301.

Note.-This is section 121 of the Probate and Administration Act.

## Section 302.

Note.—This is section 122 of the Probate and Administration Act. According to English Law, although the legacy is not immediately payable, yet the person entitled may come into Court and pray that a sufficient sum may be set appart to answer the legacy when it shall become due.—Phipps v. Annesly, 2 Ap. 58 (See Henderson's Law of Succession.).

### Section 303.

Note.—This is section 123 of the Probate and Administration Act.

## Section 304.

Note.—This is section 124 of the Probate and Administration Act. The principle on which this section is based, is that the legatee being entitled to receive a certain sum, on the happening of the contingent event, the legacy is not capable of being secured by the present appropriation of any sum of stock.—Webber v. Webber, 1 Sein and Stu, 311.

## Section 305.

Note.—This section has not been incorporated in the Probate and Administration Act.

# PART XXXVIII.

## Section 309.

Note.—This is section 128 of the Probate and Administration Act. The principle underlying in this section is that specific legacies are considered as separated from the general estate and appropriated at the time of the testator's death and consequently from the period whatever produce accrues upon them and nothing more or less belongs to the legatee.—Williams on Executor, 2, 1429.

## Section 310.

Note.—This is section 129 of the Probate and Administration Act.

## Section 311.

Note.—This is section 130 of the Probate and Administration Act. The executor has a year allowed to him within which he is to reduce the estate into possession. On the expiration of that period the interest is payable.

## Section 312.

Note.—This is section 131 of the Probate and Administration Act. It is natural that when a time has been fixed by the testator, the legacies will not carry interest before the arrival of the appointed time.

# PART, XXXIX.

## Section 316.

Note,—This is section 135 of the Probate and Administration

Rule of refunding.-It must here be mentioned that a legatee paid voluntarily by an executor is not obliged to refund to him, or to the other legatees, unless the executor proves insolvent. But he must so refund if payment has not been voluntary, though as a rule, without interest; and, semble, he must also refund, if payment has been obtained by fraud or misrepresentation. A legatee, whether specific or pecuniary must refund, at the suit of unsatisfied creditors, unless, possibly, the legacy has been paid by the executor de bonis proprus, in an action by the legatee, in which the executor admitted assets. If the estate has been administered by the Court, pecuniary legatees refund rateably only, but this rule is not applicable where the executor has administered out of Court. An executor, having in mistake made payments to an annuitant to which he was not entitled, was allowed to retain them out of the subsequent payments. He may recover over from legatees any duties on their legacies which he has been compelled to pay, though a release to him may have contained a recital that he had retained the amounts payable. - Walker and Elgood on Executors, рр. 226-227.

#### PART XL.

Devastation by executors and administrators.—Executors and administrators who have committed a devastavit of a deceased person's assets, are liable in the same manner as their testator or intestate would have been, of living. Executors will be liable for loss occasioned by negligence in not getting in the estate, as a breach of trust; but it is not their absolute duty at once to call an investment. If persons accept the trust of executors, they must perform it; they must use diligence. If there be crassa negligentia, and a loss sustained by the estate, it falls upon the executors. So they will be liable if they negligently omit to sue for a debt, whereby it becomes barred by time; and they will be charged with a debt lost through the benkruptcy or insolvency of the debtor, if they have improperly delayed taking steps to recover the same.—Vide Walker and Elgood on Executors, pp. 253-296.

## PART XLI.

Note.-Hindus, Mahomedans and Buddhists are not affected by the Succession Act.